Supreme Court, U.S.
FILED

No. 94 440 AUG 24 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK SETOLA,
CHERYL SETOLA,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET INC.,

and

HYDRA-MATIC DIVISION,
GENERAL MOTORS CORPORATION,

and

GENERAL MOTORS CORPORATION,

Respondents.

ON WRIT OF CERTIORATI TO THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court of the United States, as the national guardian and safeguard of Judicial Integrity, require all Federal Judges in passing on cases involving on the exercise of Judicial Discretion, the one area of the Courts where prejudice is most likely to creep in, to state all facts and reasons considered, thus with every case demonstrating that not even the slightest prejudice, favoritism, or bias of any kind,is given any weight, to the end that the "Appearance of Justice and Intrgrity" is maintained, as respect for the Courts and Law is the cornerstone for Democracy?

2. In view of the excessive case loads today for all Courts throughout the United States, which naturally causes some need and incentive for courts to dispose of cases without a trial, is there a need for the Supreme Court of the United States to "crack the whip: on all Judges to direct them not

to grant Summary Judgment where the filings show there is sufficient evidence that at trial a Plaintiff will be able to prove a claim, or a Defendant will be able to prove a defense, and each avoid a directed verdict, although each may have committed some procedural or error, which, if upheld, will unjustly deny that party the claim or defense which by the realistically available evidence, the party deserves? Or at the heart, for such Plaintiff or Defendant to be given leave, after the form or procedural error is pointed out, to attempt to correct such deficiency?

3. In a refiled diversity, personal injury action in Ohio where Plaintiffs, New Jersey residents, are financially unable to come to Ohio, to prepare their responses to voluminous Interrogatories, etc., as planned and desired, due to disabilities caused by Defendants' alleged faults, and the Court, denies Plaintiffs' Motion For An Extension to Answer Requests for Admissions, Interroga-

tories, and then grants a Defendant's Motion to Journalize Admissions, should the Court grant Plaintiffs' Motion Under Rule 36(b) to Withdraw the Admissions, on important points of liability, when Defendants do not, and can not, show any prejudice from the loss of evidence, as required by Rule 36(b), nor any prejudice in preparation for trial, which then was not scheduled, when Plaintiffs have then filed their Responses to the Requests for Admissions, 51 pages of Answers to Interrogatories, and Requests To Production of Documents, voluminous in number, substantially after the journalization of Admissions, but previously by two (2) years or more, all key, and some "work product" documents were given to Defendants, including all evidences on liability and medical records and reports, and Defendants had deposed Plaintiffs in the prior same action, for four (4) days, so that Defendants were not denied any material evidences, nor information, nor documents, and Plaintiffs

and their counsel had cooperated in Discovery, in good faith?

4. In a Product Liability case, involving a defect inthe brake system, by reason of the tested and proven presence in the brake fluid system of a foreign oil, causing the calipers to press against the rotors, generating excessive heat with a progressive resulting loss of braking power, is such a defect a direct contributing cause, or one of the proximate causes, of the resulting collision and serious personal injuries, when the driver, applies the brakes, and they fail completely, as verified leter?

5. Where a Chevrolet car dealer advises the owner of the car purchased from that dealer, that the brake system on the said car, is safe, and that the car is safe to drive, and that all of the car owner's ideas of the defects and dangers in the brake system are merely in the car owner's head, and are not

real, with the result that the car owner relies thereon, and decides thereupon to follow the Dealer's direction and order to drive the car to the Dealer, when the car was in a highly and unreasonably dangerous condition, due to the foreign oil, progressively causing brake loss, is such an act of negligence on the part of the car dealer actionable as to the owner who is injured as a result of such a highly dangerous and irresponsible order by the car dealer, all when the Dealer's Service Manager and mechanic knew or should have known that the brakes could and would progressively lose their power?

6. In such an action where the Court has journalized the Admissions, including one that the Plaintiff admits that his failure to maintain assured clear distance ahead caused the accident covered in Plaintiffs' Complaint, should the Trial Court strictly construe the Admission against the Defendant, and among other things, hold that such admission merely

admits only that Plaintiff's failure was "a proximate cause: and not "the sole cause," and that any negligence or strict liability fault by a Defendant may be an actionable "proximate cause" if the evidence meets the definition of a proximate cause as to such defendant?

7. If Defendants file a motion to strike Plaintiffs' Affidavits, is the court under duty to consider all parts thereof that are not subject to objection as being conclusory, argumentative, hearsay, self-serving, or otherwise objectionable? Or under Rules of Evidence 705, is the Court under a duty, once the deficiency or objectionable parts are, at least, pointed out generally, to give the party an opportunity to correct any errors?

8. In a Summary Judgment action, where numerous Affidavits are filed and the Defendants claim that the Affidavits are defective, is the District Court under Rules of Evidence, 703, 705, under the duty to examine the

Affidavits, looking at them favorably from the standpoint of the party moved against, under Rule 56(c) and (e), and then, if the Affidavits demonstrate by interference the competence of the Affiant to give expert opinions, and then, is the Court under a duty to accept the Affidavits, and is it prejudicial error for the Courts to reject and strike such Affidavits? Under Rules of Evidence 705, is there a duty, if the Court strikes the Affidavits, to give leave to file Dupplementary Affidavits if, and when, any found defects or omissions in the Affidavits are corrected?

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CERTIFICATE OF SERVICE OF PETITION FOR WRIT OF CERTIORARI.

Three copies of the above Petition are mailed by U.S. Mail this August 24, 1994, to Attorneys Marcia Wagner and David J. Rohrbacher, NIcholson and Light, Attorneys for Defendant-Appellee Bob Schmidt Chevrolet, Inc., One SeaGate, Suite 170, Toledo, Ohio 43604-1555, and Attorneys Ray A. Farris and Dennis A. Lyle, Attorneys for Defendant-Appellee Hydra-Matic Division and General Motors Corporation, One SeaGate, Seventeenth Floor, Toledo, Ohio 43603-2088.

John G. Rust

John G. Rust
Petitioners' Attorney

PETITION FOR WRIT OF CERTIORARI

Petitioners Frank Setola and Cheryl Setola do hereby petition the Honorable Supreme Court of the United states to issue in this case a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit.

REFERENCE TO OFFICIAL AND UN-OFFICIAL REPORTS OF OPINION.

No opinions by either the Court of Appeals, nor the District Court, have been published.

STATEMENT OF JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit judgment herein sought to be reviewed was rendered on May 26, 1994, and on June 16, 1994 rendered the judgment herein sought to be reviewed, denied Plaintiffs "Petition under Rule 40 For Rehearing"

and Plaintiffs-Appellant's Suggestion under App. Rule 35 For Rehearing En Banc because each was filed on June 10, 1994 one day later. See App. P. 3 .

This counsel had mailed about 1:00 A.M., June 9, 1994 the PEtition for Rehearing by Express Mail in time for the mail in the regular truck to Cincinnati to be delivered later that morning, and would have been timely filed, except that this counsel did not know that Express Mail from Toledo to Cincinnati goes to Columbus, and then to Cincinnati; apparently, if the PEtition for Rehearing had been mailed "Priority Mail", the PEtition For Rehearing would have been timely filed.

In 28 USCS Section 1254, the text in part reads:

> "§1254. Courts of appeals; certiorari; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted

upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

In this diversity action, the District Court has jurisdiction under Title 28, U.S.C. §1332,

STATEMENT OF THE CASE

In this Diversity PErsonal Injury Action, Petitioners and Plaintiffs-Appellants, Frank and Cheryl Setola seek to recover for strict liability and negligence for the permanently disabling injuries to Mr. Setola when the brakes on his new 1985 Chevrolet Corvette, less than 60 days after purchase, failed completely to function due to defects in the brakes resulting from a mineral oil getting into the broken system, which in turn caused the brake calipers continually to press against the brake rotors, generating excessive heat, which caused progressively the brakes to get worse, and then this in time caused a complete brake fai-

lure, and this all combined to cause Mr. Setola to run into the rear of a car stopped ahead, on January 30, 1986, in Toledo, Ohio. IF the brakes had worked as they had before, when Mr. Setola drove from some 10 miles away to downtown Toledo, Mr. Setola would have stopped before the collision. When a few minutes before the collision, MR. Setola called the dealer Bob Schmidt Chevtolet, to ask what to do because of multiple brake problems, including having to stop downtown in Toledo with the emergency brake, and the Service Manager and his superior told him the brakes were okay, that the thought of brake problems was all in Mr. Setola's head, and the Service Manager then told or ordered Mr. Setola to drive the Corvette from downtown Toledo, about 10 miles, to Bob Schmidt Chevrolet, Inc., hereinafter referred to as Bob Schmidt. Under Warranty, the owner is supposed to follow directions from the

Chevrolet dealer.

Mr. and MRs. Setola then timely filed on January 29, 1988, an action in the United States District Court, N.D. of Ohio, West Division in Toledo, which was remanded to the State Court, and then dismissed on June 22, 1989, without PRejudice and with the right to refile in one year, under Ohio Rule 41, and Ohio Revised Code 2305.19. The Setolas refiled timely this action in the District Court in Toledo, Northern Division, on June 22, 1990, on Diversity, as the Setolas then were residents of NEw Jersey.

In the prior Action, the Setolas came from NEw Jersey, were deposed by Bob Schmidt and General Motors, hereinafter referred to as "GM," over a total of four days, and informal, but comprehensive Disclosure and Discovery was accomplished voluntarily and some informally, so that all "raw evidences" were given by Plain-

tiffs, including tests of the brake system showing the "mineral oil" contaminant in the Corvette's brake fluid, and complete MEdical documents and even some "work product" papers.

On October 11, 1990 the case was set for trial on September 9, 1991. On November 2, 1990, Bob Schmidt Chevrolet filed volumnious Interrogatories and on June 4, 1991, Plaintiffs completed their work on Bob Schmidt Interrogatories, Request For Production, etc., and filed Supplemental Answers and Responses with 805 pages, copies to G.M.

On June 17, 1991, Plaintiffs moved to vacate their trial date of September 9, 1991, and also to extend Discovery, pointing out the possibility of bankruptcy of Mr. Setola, and the uncertainty arising therefrom; and also some matters eprsonal to this counsel and this was granted July 1, 1991.

General Motors on November 14, 1990, filed voluminous Interrogatories, Requests for Documents and 4 Requests for Admissions. In trying to get these Answers and Responses Mr. and MRs. Setola did not have the money, were either Bankrupt or facing Bankruptcy, or their van broke down, or similar problems prevented them from coming to Toledo as planned. On March 18, 1991, General Motors filed their Motion, to Journalize Admissions, but without first, as we claim, and is true, complying with local District Court Rule 304, which provides:

> "Rule 3.04. PRetrial Discovery Conferences. Counsel are encouraged to participate in pretrial discovery conferences to reduce in every way possible the filing of unnecessary discovery procedures. To curtail undue delay in the administration of justice, no discovery procedure filed under Rules 26 through 37 of the Federal Rules of Civil Procedure to which objection or opposition is made by the responding party shall be taken under consideration by the Court unless the party seeking discovery shall first advise the

Court in writing that, after personal consultation and sincere attempts to resolve differences, the Parties are unable to reach an accord. This statement shall recite those matters which remain in dispute and, in addition, the date, time and place of such conference, and the names of all Parties participating therein. It shall be the responsibility of counsel for the Party seeking discovery to initiate such personal conslutation."

G.M.'s counsel and this counsel had differed, not as to anything, about each other, but when the Corvette's brake system had been inspected at another Chevrolet dealer, one Dave White Chevrolet, Mr. Setola said General Motors had a representative there, but G.M. denied having any papers relating to Mr. Setola's Corvette, although Bob Schmidt had done work under Warranty for Mr. Setola. This counsel had been told before this case, that General Motors would simply, "Stonewall." This counsel did not doubt General Motors' Counsel in Toledo. This counsel did challenge

that General MOtors had a representative at Dave White Chevrolet when the Corvette's brake system was inspected. This was later confirmed by the work notes of the engineer, employed by Mr. Setola's liability carrier, Celina Mutual Company, Mr. Lawrence Wilson, whose Affidavit and work papers were filed on July 1, 1991, and all of whose findings together with the investigations of Mr. Setola's liability carrier, had been given to General Motors' Counsel and to Bob Schmidt's Counsel, in the prior case. But General Motors still denies any papers on MR. Setola.

Although Plaintiffs filed their Motion on April 5, 1991, for an Extension to April 17, 1991, to file Answers to Interrogatories and Responses to Admissions, the District Court denied this time, and on April 10, 1991, entered an Order Journalizing the Admissions, covering the following Requests, which read:

At Page 5 of General Motors' Requests, Interrogatories, etc.:

REQUEST FOR ADMISSION NO. 1: Please admit that there was and is no contract between Plaintiffs and General Motors Corporation in respect of this 1985 Corvette.

At Page 11 of General Motors' Request, etc:

REQUEST FOR ADMISSION NO. 3: Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant G. M.

At Page 12 of General Motors' Request 3, etc.

REQUEST FOR ADMISSION NO. 3: Please admit that this 1985 Chevrolet Corvette was not defectively manufactured by defendant G. M.

At Page 21 of General Motors' Requests, etc.

REQUEST FOR ADMISSION NO. 4: Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred to in plaintiffs' complaint.

In response to G. M.'s Motion for Summary Judgment, filed June 12, 1991, which relied exclusively on the Admissions, Plaintiffs filed their Responses, and Affidavits

of Mr. Frank F. Setola, filed July 1, 1991, App. 46; Engineer Lawrence F. Wilson, filed July 1, 1991, Chemist and Engineer Ervin LEshner, filed July 8, 1991, App. 103; and Affidavits of PEter DeWees, filed July 8, 1991, App. 110, and a Supplementary Response, filed July 10, 1991, General Motors' counsel then filed a Reply, and Motion To Strike Plaintiffs' Affidavits of E. LEshner, PEter DeWees, and an unsworn 2-page Interview with a Mechanic, Frank Stevens, on July 31, 1991, discussing brake problems from contaminants. Plaintiffs filed a Response to Motion to Strike Plaintiffs' said Affidavits, on August 29, 1991, and G. M. a Reply on this Motion to Strike Affidavits, filed September 11, 1991.

Plaintiffs defended on the grounds that by Engineer Leshner's Opinion that the contaminated oil was <u>probably in the car when sold by General Motors</u>, and that as a result, the Corvette was unreasonably dan-

gerous and defective and that this defect directly contributed to MR. Setola's collision, and injuries, and General Motors could be held, although this defect might not be the sole cause, but was a proximate cause. Plaintiffs contended then, and now, that to put the contaminated oil into the brake system was neither an act of manu facturer" or "design", and therefore this contention was not barred by the Admissions.

The District Court granted General Motors' Motion for Summary JUdgment, and denied Motions to Strike Affidavits as Moot, on November 4, 1991.

On December 7, 1991, Bob Schmidt Chevrolet filed its Motion for Summary Judgment, depending on MR. Setola's Admission that his failure "to maintain assured clear distance ahead caused the accident averred in Plaintiffs' Complaint"; and also on the Affidavit of Witness

McCray, who was in the car ahead of the car hit by MR. Setola, and swore that she saw Mr. Setola's car in her rear vehicle and could tell that he was coming so fast that he could not stop; and also on the deposition of Police Officer Medon, who did not himself check the brakes, but thought the brakes were o.k. from seeing Mr. Setola move the car. MR. Setola denied the above.

Mr. Pete DeWees' Affidavit, App. 110, 111 stated:

> "Mr. D: About the only thing that I remember is trying to move the car from where the tow truck operator dropped it."

Also Mr. DeWees stated at App. 114:

> "Mr. D: Iremember we were trying to figure out why the brake pedal was so hard and looking at the brake reservoir I remember the fluid in it appeared unusually dark and I think we opened the top of the reservoir, saw the dark fluid, couldn't figure out what it was and I don't know who the party was, but someone called out a chemist or analyst to take a sample of the fluid, and I don't remember who the gentleman was."

And also at App. 121:

> "Mr. R: OK. You said somebody from General Motors was
>
> Mr. D: I thought a factory rep or someone was there at that time or someone from their legal staff, uh, someone was there representing General Motors in one form or another."

And at App. 128:

> "Mr. R: Alright. Was there any other evidences of any defects in the brakes?
>
> Mr. D: Just that the pedal was unusually hard.
>
> Mr. D: And that we could see the discoloration in the fluid."

The District Court granted General Motors' Motion for Summary Judgment, and denied Motions to Strike Affidavits as Moot, on November 4, 1991.

On December 7, 1991, Bob Schmidt Chevrolet filed its Motion for Summary Judgment, Entry 56, and Plaintiffs filed their Response on January 7, 1992, Entry 59, along with the Affidavit of Frank Setola, filed January 7, 1992, Entry 61.

On June 8, Plaintiffs filed their Motion for Leave to File Supplementary Response to Bob Schmidt's Motion for Summary JUdgment and then filed it June 15, 1992 as per Court Order of July 6, 1992.

Also, on June 17, 1992, Plaintiff filed their Motion for Withdrawal of Admissions and tendered their REsponse to Admissions Answers to Interrogatories, and Requests for Production of Documents. On July 7, 1992, General Motors filed their Opposition to Withdrawal of Admissions, although no loss of any evidence was mentioned, and on August 4, 1992, the District Court denied Plaintiff's Motion to Withdraw the Admissions.

Then Plaintiffs timely, on August 12, 1992, filed their Motion for Reconsideration, of Court's Denial of Plaintiffs' Motion to Withdraw Admissions; and on August 13, 1992, filed a Motion to file Instanter Affidavit of Ervin Leshner.

On October 14, 1982, Entry 83, the District Court denied Plaintiffs' Motion for Reconsideration of Order denying Plaintiffs' Motion to Withdraw Affidavits, denied Plaintiffs' Motion for filing additional Affidavits.

On October 16, 1992, the District Court issued Judgment, Terminating the case, App. 14.

On October 30, 1992, Plaintiffs timely served on General Motors and Bob Schmidt Chevrolet's Counsel the Motions to Alter, Amend Judgment under Rule 59 and/or 52 of August 16, 1992, and then on November 2, 1992, filed the said motion, Entry 85, together with an Affidavit of:

Frank setola, App. 7;

Alan Karoly, App. 136;

Douglas Brown,

Cheryl Setola.

This counsel was not able to go to New JErsey, and this necessitated the several

Affidavits. Money causes many problems and lack thereof causes many problems.

On August 17, 1992 the Court granted Plaintiffs' August 14, 1992 Motion for LEave to file the attached Affidavit of Mr. Leshner, sworn to on August 16, 1992, see Entry 75. He opined that General Motors was negligent in using rubber for the seals in the brake system, because since 1980 "new elastomers" were available that do not distort when exposed to oil. In the above Affidavit on Page 1:

"Incompatible Materials in Motor Vehicles A Design Defect

> Research has shown that 15 times for each 1,000 times the brakes or power steering are serviced, the brakes will fail due to power steering fluid in the brake system or the steering will fail due to brake fluid in the power steering system.
>
> In 1937 General Motors introduced automobile hydraulic brakes on the Oldsmobile. At that time, elastomers with the physical properties needed for hydraulic brake systems, were not developed. Rubber was the only material suitable for the seals and hoses used in hydraulic brakes. Rubber swells and deteriorates when it is in contact

oil but is not affected by alcohol. Therefore, alcohol was standardized for brake fluids (glycol and glycerin are alcohols).

Later, power steering systems and transmissions were developed that use oil fluids and elastomeric materials (synthetic rubber) for the seals and hoses. If brake fluid is inadvertently put into the steering reservoir the seals and hoses will deteriorate and fail. When this happens the steering is lost and many accidents follow.

Because brake fluid, power steering fluid, and transmission fluid are frequently mistaken for one another, a safety problem exists. PEople inadvertently refill or add oil to the hydraulic brake reservoir or brake fluid to the power steering reservoir. This causes the brakes or power steering to fail and accounts for many accidents.

The Aircraft Industry and Federal Aviation Administration (FAA) specifies that brake fluid be color coded RED in order to minimize the problem of mechanics using the wrong type of fluid in the brake system. The auto industry color codes transmission fluid RED. This creates confusion with some mechanics.

There is a very high probability that an improper fluid will be used when vehicles are serviced. All manufacturers of motor vehicles are NEGLIGENT in ignoring the safety problem created by the use of incompatible materials in motor vehicles. It is technically and economically feasible to eliminate the hazard that is present in all motor

vehicles through proper material selection.

In recent years (since 1980) new elastomers that do not deteriorate in the presence of oil or alcohol have been developed but the auto industry has not adopted their use for brakes or steering systems.

The use of incompatible materials that create a hazard in a vehicle is a DESIGN ERROR. A product with an unnecessary and correctable safety hazard is DEFECTIVE.

FAILURE TO WARN

All manufacturers of motor vehicles are NEGLIGENT in FAILING TO WARN of the hazard of using improper fluids in vehicle systems.

The designer of a product is responsible for all hazards at the time of design, and should attempt to design them out. The designer must not assume that the user will be aware of any hazardous condition which is obvious to him. The prudent designer should endeavor to see all possible hazards and should use his engineering skills to design out these dangers.

If it is not possible to design out a potential hazard without making the product uneconomic or nonfunctional, it becomes incumbent upon the designer to design permanent warnings in conspicuous locations and of sufficient prominence on the product to cause a person to change their normal behavior. However, warnings are not a substitute for proper design. Dependence on warnings and operating manuals are not in themselves sufficient to assure

product safety."

On October 13, 1992, Plaintiff filed this Motion for Leave to file Instanter Affidavit of Ervin LEshner, Entry 82, sworn to on October 8, 1992, and on Page 1 thereof, Mr. Leshner stated after reciting all the documents and reports heretofore stated herein, as follows:

> "In regard to the issues presented to me for investigation and the statements made to me by Mr. Setola, I have talked with him, read the report No. 209586 Brake Failure Investigation, 1985 Corvette, for Celina Mutual Insurance Co., submitted by Mr. Lawrence F. Wilson, P.E., PResident Product Analysis and Structural Testing, Inc., and assuming the truth of what Mr. Wilson did and observed, as stated in his report, and assuming further the truth of the "analytical report", submitted by MR. K. F. Sporek, dated May 5, 1986, ref.: 209586 by the Contract Laboratories, Inc., Sylvania, Ohio, and so signed by MR. K.F. Sporek; and assuming further that in the brake system fluid, that was withdrawn by MR. Lawrence F. Wilson, had the ingredients or contaminants, as to reported by the said Contract Laboratories, Associates, Inc.; and in assuming the history of the condition and what was done with the said 1985 Chevrolet Corvette,

and assuming the work done by Bob Schmidt Chevrolet, Inc. as shown by their work orders; 56397, 56862, 57828, heretofore mentioned by MR. Setola, it is my professional opinion, that to a reasonable degree of engineering certainty, that, the said brake system fluid was so contaminated that it did cause the brake failure mentioned by MR. Setola, which in turn caused Mr. Setola to be unable to stop said Corvette, and thereby the contaminated brake system fluid, and the prematurely worn brakes that were caused by the swelled brake cylinder rubber parts did proximately cause the said collision of January 30, 1986 and the injuries done therein, and

Based upon MR. Setola's Affidavit and statement that the representatives of Bob Schmidt did direct him to drive this Corvette to the Bob Schmidt Chevrolet and Garage, and that this direction was given to MR. Setola, after he had told them how the Corvette brakes were not functioning properly and offered him difficulty in stopping on the day in question, it is my professional opinion that such directions by Bob Schmidt was highly dangerous.

Based upon Mr. Setola's statements that, if the Corvette's brake system, when he started to drive to the Bob Schmidt Chevrolet Garage had worked as well as the Corvette's brake system had worked when MR. Setola was driving to downtown Toledo earlier that morning, then, it is my opinion within reasonable engineering certainty and probability, that the Corvette's brake system, even defective as it was would have been able to have allowed

Mr. Setola to have stopped before the collision.

Inasmuch as Mr. Setola has stated that when the brake pedal on the Corvette, when on route to Bob Schmidt, was pressed, that he could not get the brake pedal to go down in order to make the brakes function, it is clear and obvious that the brake system was defective, and that this proximately caused the collision that followed.

Obviously, also, if the Corvette's brakes had worked as intended when functioning properly, the Corvette going at even 50 MPH would have been able to stop in the 200 to 300 ft. distance required when the traffic light he was approaching turned from green to yellow.

Mr. Setola approximates his speed to have been 45 MPH (66 ft. per second) when he initially tried to stop. If the distance to stop were only 200 ft., at an average speed of the decelerating vehicle would be 22.5 MPH Mr. Setola would have had 6 seconds to stop. At the time of impact, assuming Mr. Setola was traveling 15 MPH, the average speed would have been 30 MPH or 44 feet per second. Therefore, the total time from the time Mr. Setola saw the traffic light turn yellow until the impact was approximately 4 to 5 seconds.

Mr. Setola had reduced the speed of his vehicle to 10 or 15 MPH at the time of impact by downshifting and attempting to stop the vehicle with the hand brake. MR. Setola states that the hand brake did not function. He also states that the

brakes were dragging prior to the accident. The dragging brakes were caused by the defective master brake cylinder that kept the brake pads in constant contact under pressure with the brake discs, causing the brake pads to wear out prematurely. The hand brake failed to function because the pads wore through completely just prior to the accident. (the hand brake uses the same brake pads as the foot brake but operates only on the rear brakes).

It is my opinion, within reasonable engineering certainty and probability, that the accident would not have occurred if General Motors Corporation had not designed, manufactured and sold a vehicle that was defective because of design errors and failed to warn of the hazard created by the design defect, or if Bob Schmidt Chevrolet properly maintained and repaired Mr. Setola's vehicle, or had not advised him to drive the defective and hazardous vehicle."

ARGUMENT FOR JURISDICTION NO. ONE

AMERICAN COURTS NEED DIRECTION FROM THIS COURT THAT IN AN ACTION WHERE THE TRIAL COURT JOURNALIZES ADMISSIONS THAT THE PLAINTIFF DRIVERS "...FAILURE TO MAINTAIN ASSURED CLEAR DISTANCE AHEAD CAUSED THE ACCIDENT...", IS SUCH AN ADMISSION TO BE CONSTRUED AS THE "SOLE CAUSE", THOUGH SUCH WORDS WERE NOT USED BY THE PARTY DRAFTING THE ADMISSIONS, AND RULED TO PROVIDE A BAR TO ACTIONS FOR NEGLIGENCE, FOR ADVISING THE PLAINTIFF NOT TO DRIVE THE CAR BECAUSE IT WAS IN AN OBVIOUSLY DANGEROUS CONDITION, BECAUSE OF VERY FAULTY BRAKES, AND FAILURE TO REPAIR SERIOUS BRAKE PROBLEMS, AND IN RETURNING THE CAR WHEN THE BRAKES WERE NOT CORRECTED, WITHOUT WARNING THE OWNER, AND FOR STRICT LIABILITY, WHEN THE CAR AS RETURNED HAD OBVIOUSLY DEFECTIVE BRAKES, AS VERIFIED LATER.

First of all, the Courts below construed and applied the word "caused" drafted and chosen by counsel for GM, to mean "sole cause", and each Court showed that it felt absolutely free so to do, and not under any constraint from the U.S. Supreme Court to construe the words against the party choosing such words. Common sense says if GM here meant "caused" to mean "sole cause" or

proximate cause, why didn't they say so.

It is "Hornebook Law" to say that in construing a contract, that the contract will be construed against the party choosing or drafting the words.

Federal Rule 56 (c), Motion and Proceedings thereon, only says in the part here material:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving marty is entitled to a judgment as a matter of law"

The Ohio Rule 56 (c) on this point "spells out" the rule of construction in favor of the party moved against, as follows:

> "A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation

construed most strongly in his favor."

We stated at page 27 of our Brief in the Court of Appeals:

> "In Anderson v. Liberty Lobby, Inc., 477 U.S. 422, the United States Supreme Court states in 91 LEd 2d. at page 216:
>
> 'Credibility determinations, the weighing or the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 US, at 158-159, 26 L Ed 2d 142, 90 S Ct 1598.'"

By Mr. Leshner's Affidavit of July 8, 1991, App. P. 103, he opined from all of Engineer Wilson's findings and the tests of the brake fluid that the oil contaminant was in the Corvette when GM sold it to Bob Schmidt in August, 1985. Since American Customs Parts Manager Pete DeWees found that the brakes were defective, the pedal would not go down, in his

Affidavit, App. P. 114 and 128, the evidence is clear that the oil was in the brake system when it left Bob Schmidt on January 29, 1986, and Prima Facie proof of an actionable defect comes from Mr. Setola's Affidavit, App. P. .

The Trial Court dismissed Plaintiffs claims against GM, and Bob Schmidt, because Mr. Setola's Admission gave each Defendant a complete bar and defense.

Again, prior Federal decisions did not prevent such holding by all the lower courts in this case.

We stated in our Brief in the Court of Appeals at page 26:

> "Mr. Setola swore he would not have driven the car, if he had not been directed so to do by the Bob Schmidt Chevrolet Service Manager.
>
> '...As quoted earlier herein, Mr. Setola, at page 18 of his Affidavit of January 7, 1992, stated in part:
>
> '...and the Bob Schmidt people had told him that it was all in his head, that the car was safe to drive, he then decided to drive, and would not have driven the car except for what

the Bob Schmidt Chevrolet man said.'

"Proximate cause is defined in 70 O. Jur 3d Negligence at page 97:

'Section 37. Definitions
While it has been said that it is not easy to define the term "proximate cause," various judicial definitions of the term are to be found. A frequent definition of the proximate cause of a result is that cause[98] which in a natural and continued sequence contributes to produce the result, and without which it would not have happened.[99] The proximate cause of an injury has also been defined as that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury and without which the result would not have occurred.[1]'

And that text at page 96 states: 'There may, however, be more than one proximate cause of an injury.'

57 A Am. Jur. 2d. Negligence states at page 451:

'Section 471. Generally
A proximate cause has been defined as an efficient cause, [94] and generally speaking, it has been said that a cause is proximate when it is not so remote in efficiency as to be dismissed from consideration by the court.[95] The test applied to determine whether negligent conduct was the efficient, or proximate, cause of the injury or loss suffered by the claimant is whether such conduct is a cause without - or "but for" - which [96] the injury would

not have taken place.[97] This is also known as the "sine qua non" rule.[98]"

In Ohio, as this Court may know, the so-called Law of the case is found first in the Syllabus, if the opinion has one. Thus in Onderko v. Richmond Manufacturing Co., 31 Ohio St. 3d 296 (1987), the syllabus reads:

"Volumtary and unreasonable assumption of a known risk posed by a product constitutes an absslute bar to recovery in a products liability action based upon strict liability in tort."

In that holding, the Ohio Supreme Court held that in a strict liability case that Contributory Negligence was not a defense, and Ohio's Comparative Negligence Statute, Ohio Revised Code 2315.19 did not apply in strict liability cases. But on a negligence claim, contributory negligence was a defense, under the Comparative Negligence Statute, if a jury found it to be 51% or more of the fault. On this the Ohio Supreme Court stated in 31 Ohio St. 3d at page 300:

"A plaintiff injured by a product is

not limited to the theory of strict liability as the sole means of redress. An action in legligence may also be available to compensate the plaintiff for his injury. Strict products liability and negligence are distinct theories, but they have never been regarded as mutually exclusive. Section 402A of the Restatement, supra, at Comment a[2]; Lonzrick v. Republic Steel Corp. (1966), 6 Ohio St. 2d 227, 35 O.O. 2d 404, 218 N.E. 2d 185, paragraph one of the syllabus. Nor is a plaintiff required to elect between the two theories. Id. A case in which the plaintiff alleges strict products liability may also be submitted to the fact-finder on a negligence theory. 2 American Law of Products Liability 3d (1987) 44, Section 16:31. Thus, a Plaintiff whose recovery is barred on a strick liability claim due to a finding that he assumed the risk may still recover on a negligence theory where such negligence can be proved. Section 402A of the Restatement, supra, at Comment a. In such a case, the plaintiff's assumption of the risk would not necessarily be an absolute bar but would merely operate to reduce his recovery, if the jury finds that such assumption of the risk amounted to fifty percent or less of the total responsibility for the injuries incurred. R.C. 2315.19; Anderson v. Ceccardi (1983), 6 Ohio St. 3d 110, 6 OBR 170, 451 N.E. 2d 780."

If GM and Bob Schmidt (as seller and repair person) were chargeable with a defect

in the Corvette, then the only question properly was whether the defective brakes was a proximate cause of Mr. Setola's injuries, and his negligence, whatever it was, was not relevant. Thus in Dillinger v. Caterpillar Inc., 959 F2d 430 (3rd Cir. 1992), Plaintiff Dillinger was injured when the brakes of a Caterpillar dumpster failed. On points here material, the Court stated in 959 F.2d at page 443:

> "In our view, Foley does not accurately reflect the approach the Pennsylvania Supreme Court would follow in a strict products liability proceeding. In case after-case, the Pennsylvania Supreme Court has made clear that evidences of a plaintiff's contributory negligence is inadmissible in a strict products liability proceeding. For example, in Berkebile, the court noted that '(t)he crucial differemce between strict liability and negligence is that the existence od due care, whether on the part of the seller or consumer, is irrelevant.' 462 Pa. at 94, 337 A.2d at 899, Next, in McCown, the court specifically held that the plaintiff's contributory negligence was inadmissible to reduce the plaintiff's recovery or th determine the defendant's liability. 463 Pa. at 15-17, 342 A.2d at 382. In Azzarello, the court underscored the notion that the supplier of a product is the 'guarantor' of the product's

safety, and that the jury could find that a product is defective if it 'lacked any element necessary to make it safe for (its intended) use.' 480 Pa. at 560, 391 A.2d at 1027. The court further precueded the mention of the term 'unreasonable' in an instruction concerning the existence of a defect. Pennsylvania's appellate courts, as well as federal courts construing Pennsylvania law, have observed that the Supreme Court has unequivocally excluded negligence concepts from produce liability cases. Conti v. Ford Motor Co., 578 F.Supp. at 1434; Staymates, 364 Pa. Super. at 43-44, 527 A.2d at 143.

Most importantly, there is no meaningful way to reconcile the view that a plaintiff's negligence of the type involved in Foley should be admitted to undercut causation with the Supreme Court's prohibition of the introduction of a plaintiff's negligence to defeat liability. A comparison of the Supreme Court's decision in McCown with the Superior Court's decision in Foley is instructive."

And at page 445:

"For these reasons, evidence of Dillinger's failure to use the alternative braking system or read the operator's manual should not have been admitted to negate causation."

The Third Circuit Court of Appeals in

959 F.2d stated at page 432:

"After a six-day trial, the jury found in favor of Caterpillar, by its negative

answer to a special interrogatory asking whether Dillinger proved by a preponderance of the evidence that the truck 'was defective, that it was defective when it left the defendant's control, and that the defect was a substantial factor in bringing about some injuries to plaintiff.'"

ARGUMENT FOR TAKING JURISDICTION NO. TWO

THE SUPREME COURT IN THE PRESENT ABSENCE OF ANY DEFINITIVE SUPREME COURT RULINGS AND THE SUBSTANTIAL CONFLICTS IN THE DECISIONS OF OTHER FEDERAL COURTS, SHOULD GIVE DIRELY NEEDED DIRECTION TO THE FEDERAL COURTS, AND INDEED, ALL OTHER INTERESTED COURTS, THAT RULE 36(b) SHOULD BE CONSTRUED TO ALLOW THE WITHDRAWAL OF JOURNALIZED ADMISSIONS, WHEN THE PARTY MOVING FOR WITHDRAWAL IS NOT CHARGEABLE WITH WILFUL EVASION NOR BAD FAITH, THOUGH CHARGEABLE WITH DELAY, AND THE PARTY HOLDING THE ADMISSIONS DOES NOT AFFIRMATIVELY SHOW THAT REMOVAL OF THE ADMISSIONS WILL CAUSE THE PARTY LOSING THE ADMISSIONS, NOT TO BE ABLE TO PRESENT MATERIAL EVIDENCE THAT OTHERWISE THE PARTY WOULD HAVE HAD; AND PARTICULARLY ARE THE TRIAL COURTS, UNDER THE IMPLICIT MANDATES OF RULE 1, DIRECTED TO FAVOR WITHDRAWAL OF THE ADMISSIONS WHICH OTHERWISE WILL RESULT REALISTICALLY IN A DEFAULT JUDGMENT, ON LOSS OF THE ENTIRE CLAIM OR ENTIRE DEFENSE.

Firstly, no Court nor party has referred to any controlling ruling by the U.S. Supreme Court. Secondly, there are real, substantial conflicts in the Federal Courts of Appeal DEcisions. Unless needed direction by this Court is given, Rule 36(b) can be <u>deadly</u> to a <u>Plaintiff</u> or a <u>Defendant</u>.

PEtitioner cites, as one leading case Gutting v. Falstaff Brewing Corp., 710 F.2d 1309 (CA 8, 1983), where Mrs. Gutting sued to recover insurance benefits from the death of her husband, and Falstaff defended, claiming her husband, a former Falstaff executive, had been discharged for "proper cause". After her Complaint was filed on July 8, 1981, Falstaff filed on October 13, 1981, Requests for Admissions, Interrogatories and Requests for Documents. Mrs. Gutting's first two counsel withdrew in time for conflicts of interest and her third counsel entered his appearance on March 1, 1982, and her third counsel then on April 9, 1982 filed a Motion under Rule 36 for leave to file her Answers to the requests for Admissions out of time, but this was denied on April 21, 1992. In reversing the District Court, the Eighth Circuit Court of Appeals in parts here material stated, in 710 F.2d at page 1313:

"...Rule 36(b) states in pertinent part: "T[he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Other courts have applied the same test. See, e.g., Herrin v. Blackman, 89 F.R.D. 622, 623-24 (W.D. Tenn. 1981); St. REgis Paper Co. v. Upgrade Corp., 86 F.R.D. 355, 357 (W.D. Mich. (1980) (granting defendant's motion to permit late filing of response); see also French v. United States, 416 F.2d 1149, 1152 (9th Cir.1969) (trial court has discretion to permit late response where no prejudice shown). In the instant case, however, the district court did not apply this test when evaluating Gutting's motion to file answers out of time. The court denied Gutting's motion because she never requested an extension of time from the court and the court never granted an extension. Although acknowledging the informal agreement between the parties to extend the time for responding, the court stated that such agreements do not protect the court's own interest in the management of its cases. The district court also based its decision on the "pattern of delay" demonstrated by Gutting and her apparent propensity to "Flout" the time limits of the Federal Rules of Civil Procedure. The district court did not find that Falstaff would be prejudiced by allowing late answers to be filed.

[2] Falstaff argues that prejudice is not important because the

district court denied Gutting's motion to file answers out of time as a sanction for discovery abuse. The district court focused on the delay and almost nonexistent prosecution of this case." (Emphasis Ours.)

Further, in Gutting, Supra, the Court of Appeals held that since Falstaff did not show any loss of evidences, that Falstaff did not show the required "prejudice", and therefore the belated Motion For Leave To Answer the Admissions should have been granted; and on this the Court stated in 710 F.2d at page 1313:

"[3,4] Falstaff further contends that even if a showing of prejudice is necessary, it has satisfied that requirement. Falstaff claims that even though it considered the matters in the request to be admitted, it could not be sure of the court's position and noticed depositions to begin on April 22. The court ruled the matters in the request admitted on April 21 and Falstaff elected to proceed with the depositions because it did not know whether the court might reverse its position. Falstaff claims taking those costly depositions shows it would have been prejudiced if the court had allowed late answers. Falstaff misconstrues the prejudice requirement. Rule 36 (b) states that the party obtaining the admissions must show the withdrawal will "prejudice him in maintaining his action or defense

on the merits." The prejudice contemplated by the rule "relates to the difficulty a party may face in proving its case" because of the sudden need to obtain evidence required to prove the matter that had been admitted. Brook Village North Associates v. General Electric Co., 686 F.2d 66, 70 (1st Cir. 1982); accord Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192, 193 (D.Conn. 1976). Falstaff has made no showing that it will be unable to produce evidence of Ferd Gutting's discharge for cause. It apparently has completed its discovery on this issue. We conclude that Falstaff has failed to show it willbe prejudiced in maintaining a defense on this issue.[5]" (Emphasis Ours.)

In Smith v. First National Bank of Atlanta, 837 F.2d 1575 (11th Cir., 1988) the Defendant Bank first failed timely to file a Response to Plaintiffs Requests for Admissions, and thus became liable to judgment for $50,000.00 Compensatory damages, and $1,500,000.00 punitive damages on Plaintiffs' claims that Defendant Bank was liable for the violations of the Fair Credit Reporting Act, libel, and invasion of privacy for reporting Plaintiff's reported delinquency in her Visa Account,

because her ex-husband had forged her name, when she had no account with the bank. The District Court ordered the withdrawal of the Admissions, and in 837 F.2d at page 1577 emphasized that withdrawal of Admissions should be ordered unless a loss of evidence is proved by the party holding the Admissions, by stating:

> Discovery was reopened for 60 days. Smith was also awarded $18,275 in partial compensation for expenses incurred up until remand. The court provided that plaintiff could seek relief from the withdrawal of admissions if she discovered in

"Discovery was reopened for 60 days. Smith was also awarded $18,275 in partial compensation for expenses incurred up until remand. The court provided that plaintiff could seek relief from the withdrawal of admissions if she discovered in the course of the proceedings "that the delay has in any way affected her ability to obtain appropriate discovery." This was done by a motion to reinstate the admissions. The district court carefully considered, but rejected, every allegation of specific prejudice.

Thus, the district court properly applied the two-part test in Fed.R.Civ.P. 36(b).

In Farr Man & Co., v. M/V Rozita 903 F.2d 871 (1st Cir. 1990) Plaintiff Farr Man was granted summary Judgment on February 19, 1988 on Rozita's failure to Answer Farr Man's Request for Admission, served October 30, 1987. This action involved who was to collect damages to a cargo of sugar, damaged by Amstar, the purchaser, and the stevedoring firm; Farr Man, the seller; and Lloyds of London, the insurers. After Farr Man was Granted Summary Judgment, the Court held a trial between the remaining parties, and then vacated its prior Summary Judgment for Farr Man, and finally re-allocated the amounts of damage going to each. In the Opinion in 903 F.2d the Text emphasized the basic purpose of selling all actions determined on their merits, at page 876 as follows:

> In analyzing whether it was appropriate to permit withdrawal of the admissions, we are guided by

the purposes of the Rule, as explicated by the advisory committee's note:

> Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice. Fed. R..Civ.P. 36(b), Advisory Committee's Note."

Also the First Circuit emphasized the Rule 36-(b) intention that withdrawals be allowed, unless the party holding the Admissions would truly suffer a loss of evidence to support that party's claims or defenses, and in 903 F.2d also at page 876 stated:

> "Rule 36(b)'s second part essentially requires that, prior to allowing withdrawal of admissions, the district court be convinced that the party who obtained the admission will not be prejudiced by its withdrawal. As this court has previously stated,
>
> > [t]he prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g.., caused by the unavailability of key witnesses because of the sudden need to obtain evidence with

respect to the questions previously answered by the admissions.

Brook Village N. Assocs. v. General Elect. Co., 686 F.2d at 70. See Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192 (D.Conn. 1976)."

In St. Regis Paper Co. v. Upgrade Corp., (U.S. D.Ct., W.D. Mich. S.D., 1980) withdrawal of Admissions was allowed almost 4 years later, and Defendant allowed to file Answers, because such would serve determination on the merits, and Plaintiff could not show any loss of evidence.

There is confusion in the various Court of Appeals and District Court holdings, and therefore there is need for proper direction from this Court. Mere delay in answering Interrogatories does not result in dismissal; only failure to respond to a Court Order to answer Interrogatories.

We have given far more evidences, information, documents, and photographs, informally and by 4 days of depositions of

Plaintiffs - - all before this present action.

Unless there is strong and clear direction from this court, parties will be subjected to undeserved adverse judgments.

ARGUMENT FOR JURISDICTION NO. THREE

THE UNITED STATES SUPREME COURT AS THE GUARDIAN AND SAFEGUARD OF JUDICIAL INTEGRITY, SHOULD ORDER ALL FEDERAL COURTS EACH TIME IN PASSING ON MATTERS INVOLVING THE EXERCISE OF DISCRETION, TO STATE CLEARLY AND FULLY ALL THE FACTS AND OTHER FACTORS OR REASONS CONSIDERED BY THE COURT, PARTIALLY IN THE INTEREST OF JUDICIAL ECONOMY AND TO ASSIST REVIEWING COURTS WHAT WERE THE DECISIVE AND OTHER FACTS, TO THE END THAT BIAS, PREJUDICE, OR FAVORITISM WILL LESS LIKELY OCCUR, SUCH FACTORS BEING MORE LIKELY TO OCCUR WHEN A JUDGE IS EXERCISING DISCRETION, TO THE END THAT COURTS WILL BE MORE MINDFUL TO MAINTAIN THE APPEARANCE OF JUDICIAL INTEGRITY, AS WELL AS ACHIEVING IT, AND THUS BETTER ATTAIN THE RESPECT OF THE CITIZENS FOR THE COURTS AND LAW, THE CORNERSTONE OF DEMOCRACY.

When a just claim is rejected by the Courts, citizens just don't understand.

As we stated at page 24 of our Reply Brief in the Court of Appeals:

"In Conley v. Gibson, 355 U.S. 41, 2 L.ed 80, (1957), the Court stated the basic principle, in 2 L.ed at page 86:

> 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept

> the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co. 303 US 197, 92 L ed 745, 58 S Ct 507.'"

This counsel does not know of any recent case where lower courts were criticized for taking the Law into one's hands.

On Dismissal, there's been a long time between decisions, since Societe Internationale v. Rogers, 357 US 197, 2 L.ed.2d 1255 (1958) and National Hockey Club, Inc. v. Metropolitan Hockey Club, 427 US 639, 49 L.ed. 2d 747 (1976).

We demonstrated from the start that we had nothing to hide, and, we say, we disclosed more than the Rules require.

But something went wrong here. We ask this Court to direct a return to basic American Values.

ARGUMENT FOR JURISDICTION NO. FOUR

THE UNITED STATES SUPREME COURT SHOULD TAKE JURISDICTION OVER THIS CASE TO MAKE CLEAR TO FEDERAL AND OTHER COURTS JUST WHAT WILL, AND WHAT WILL NOT, BE ACCEPTED IN THE FORM, CONTENT, OF AFFIDAVITS, AND WHETHER AN OPINION IS CONCLUSORY OR NOT, BECAUSE PRESENTLY THERE IS CONFUSION, CONFLICT: AND, ADDITIONALLY, UNDER THE SAME PRINCIPLE OF FEDERAL RULES OF EVIDENCE 705, BEFORE ENTERING AN ORDER OF DISMISSAL, THE TRIAL COURT SHOULD POINT OUT THE FOUND DEFICIENCIES IN THE AFFIDAVIT, AND GIVE THE PARTY A REASONABLE OPPORTUNITY TO AVOID THE DRASTIC ORDER, IF THE PARTY INTRUTH HAS THE EVIDENCE AVAILABLE.

The District Judge struck Mr. Setola's Affidavit of January 7, 1992, App. 58, on the ground it had too many self-serving statements, and/or conclusions, or argumentative statements. In fact, we claim that Mr. Setola merely swore to that which he observed and did. Whether his statements were favorable to him, or not, they were not "self-serving." As to whether a statement is self-serving, we cite, as given on Page 4 of our Reply Brief in the Court of Appeals:

"In 38A Words and Phrases, a "Self-Serving Declaration" is defined by the head notes in some of the cases as follows:

> 'Self-serving declaration' is one made by party in his own interest at some time and place out of court and does not include testimony which he gives as witness at trial. State v. Sharbono, 563 P.2d 61, 67, 175 Mont. 373.
>
> A 'self-serving declaration' is one made by a party inhis own interest at some time and place out of court, not including testimony which he gives as witness at the trial. Cone v. State, Miss., 271 So.2d 453, 455.'
>
> A'self-serving declaration; within rule of exclusion is one made by a party in his own interest at some place and time out of court, and does not include testimony which he gives as a witness at trial. Gibson v. Smith, Mo., 422 S.W.2d 321, 329.'

It seems that the objections to such 'self-serving declarations' occur when a party tries to say that after a key event, the party said such and such, and that such oral statement is admissible. All of Plaintiffs' Affidavits are offered to prove what the Affiant can and will testify to, at a Court trial. The question before this Court and the District Court is, and was, what evidence can Plaintiffs introduce at a trial, to show that Plaintiffs can overcome a Motion for a Directed Verdict? With that standard before this Court, we submit the District Court erred in striking completely the Affidavit of

Mr. Setola; and the same rule applies to Certified Mechanic Karoly's Affidavit, which will be discussed later."

Also, as was stated at page 6 of our Reply Brief:

"The District Court should have, at the least, disregarded the inadmissible, as the Court would have done at trial, and considered all the facts on which Plaintiffs at a trial did offer, and could have offered, evidence.

The District Court exceeded its lawful powers in striking Mr. Setola's Affidavit of January 7, 1992, Entry 60. A strongly supporting case showing the District Court glaringly, grossly, and clearly erred is Southern Concrete Co., v. United States Steel, 394 F. Supp. 362, (USDC, N.D. Georgia, Atlanta Division, 1975, where the Court stated in 394 F.Supp. at Page 380:

(20,21) An Affidavit submitted in connection with a summary judgment motion is subject to a motion to strike if it does not measure up to the standards of Rule 56(e). 6 Moore's Federal Practice ¶56.22 (1974). While the court may strike or disregard the inadmissible portions of such affidavit not in conformity with the rule and consider the rest of the affidavit, the entire affidavit may be disregarded if inadmissible matter is so interwoven or inextricably combined with the admissible portions that it is impossible, in the

practical sense, to separate them. Id. And see cases cited at id. nn. 49-51.'

Perhaps a simpler, and better test here is 'Dickheiser v. Pennsylvania R. Co., 5 F.R.D.5, D.C.E. Pa., 1945 where an appeal the Opinion and holding by Judge Bard, was adopted as the same by the Court of Appeals, (CCA3d., 155 F. 2d 266, Cert. Denied (1947) 32 9 U.S. 808, and in 5 F.R.D. Judge Bard ruled:

(4,5) Rule 56(e) U.S.C.A. following section 723c, provides, inter alia, as follows: 'Suporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein.' The rule requires that affidavits in support of a motion for summary judgment must contain evidence which would be admissible as testimony at trial. Seward v. Nissen, D.C., 2 F.R.D. 545. There is no requirement, however, that every statement in the affidavit must meed this test. Where the affidavit includes both competent and incompetent evidence, the Court should disregard the incompetent evidence but give full consideration to that which is competent. See Banco DeEspana v. Federal REserve Bank of New York, 2 Cir., 114 F.2d 438. This is nothing more than the procedure which would be followed at trial. The Court would not strike the entire testimony of a witness merely because a portion of his testimony is incompetent. The same rule is to be applied to supporting affidavits.

Accordingly, the motion to expunge or strike the supporting affidavits is denied.'

To like effect, see 6 Part 2 Morris Federal Practice, 56-762 Page 56-762."

CONCLUSION

The Record in this case does support the facts contained in the Questions Presented For Review. Respondents in the Courts below claimed mere delay is sufficient to justify denial of Withdrawal of Admissions. We say a principle is too harsh. Such delay in failing to Answer Interrogatories does not call for Dismissal.

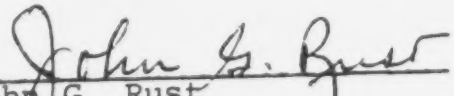
Decisions from this High and Honorable Court are truly needed for the highest levels of the Law to be attained. Conflicts and imperfect rulings do abound.

This counsel has never had the honor of appearing before this Court. As a graduate in his Senior year in the upper 15% of his class at the law school of the University of Virginia, this counsel has the ability and committment to do a job of which one can be

proud.

In behalf of Petitioners, this counsel respectfully moves that our Writ For Certiorari be granted.

Respectfully submitted,



John G. Rust
Petitioners' Attorney

Supreme Court, U.S.
FILED

(2)

No. 94 440

AUG 24 1994

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK SETOLA,
CHERYL SETOLA,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET, INC.,

and

HYRDA-MATIC DIVISION,
GENERAL MOTORS CORPORATION,

and

GENERAL MOTORS CORPORATION,

Respondents.

APPENDIX FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR SIXTH CIRCUIT

VOLUME I

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(419) 476-0347

Attorney for Petitioners

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CERTIFICATE OF SERVICE OF APPENDIX

Three copies of the above Appendix are mailed by U.S. Mail this August 24, 1994, to Attorneys Marcia Wagner and David J. Rohrbacher, Nicholson and Light, Attorneys for Defendant-Appellee Bob Schmidt Chevrolet, Inc., One SeaGate, Suite 170, Toledo, Ohio 43604-1555, and Attorneys Ray A. Farris and Dennis A. Lyle, Attorneys for Defendant-Appellee Hydra-Matic Division, and General Motors Corporation, One SeaGate, Seventeenth Floor, Toledo, Ohio 43603-2088.

John G. Rust
Petotioners' Attorney

NOT RECOMMENDED FOR PUBLICATION

No. 93-3247

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK SETOLA, ET AL., Plaintiffs-Appellants, v. BOB SCHMIDT CHEVROLET, INC., HYDRA-MATIC DIVISION, and GENERAL MOTORS CORP., Defendants-Appellees.	F I L E D MAY 26, 1994 LEONARD GREEN, CLERK ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO MEMORANDUM OPINION

BEFORE: RYAN and NORRIS, Circuit Judges; and ENGEL, Senior Circuit JUdge.

PER CURIAM. Plaintiffs appeal from orders of the district court granting summary judgment to defendants.

Having had the benefit of oral argument, and having carefully consider-

App. 1

the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in granting summary judgment to defendants.

As the reasons why judgment should be entered for defendants have been articulated by the district court, the issuance of a full written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgments of the district court are affirmed upon the reasoning set out by that court in its memorandum and order dated November 4, 1991, and its opinion and order dated October 14, 1992.

Case No: 93-3247

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

O R D E R

FRANK F. SETOLA:

FILED: JUN 16 1994
LEONARD GREEN, Clerk

Plaintiff - Appellant

CHERYL SETOLA

Plaintiff

v.

BOB SCHMIDT CHEVROLET, INC.; HYDRAMATIC, Division General Motors Corporation; GENERAL MOTORS CORPORATION

Defendants - Appellees

It appearing that the court received a Petition for Rehearing En Bank from the appellant on June 10, 1994 and that the petition was one day late,

It is ORDERED that the untimely PEtition for Rehearing En Banc not be

APP. 3

accepted for filing.

ENTERED BY ORDER OF THE COURT

(s) Leonard Green,
Leonard Green, Clerk

APP. 4

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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

DOWD, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRANK SETOLA, et al.,

Plaintiff,

-vs-

Case No. 3:90
CV7317

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant.

MEMORANDUM
OPINION

This matter is before the Court on plaintiffs' motion to alter or amend the judgment and/or to reconsider and defendants' opposition thereto. Also before the Court is defendant General Motors' motion to strike plaintiffs' motion to alter or amend. Plaintiffs

also seek leave to file instanter an affidavit and a supplemental memorandum. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

BACKGROUND

Frank Setola purchased a 1985 Corvette from Bob Schmidt Chevrolet in December 1985. After taking it back to the dealer on three separate occasions for service work, plaintiff was involved in a collision in which his vehicle rear-ended another and for which he was cited for failure to maintain an assured clear distance. Setola and his wife assert a products liability and negligence claim against the dealer and manufacturer for injuries incurred as a result of the accident.

Originally filed in the Lucas County Court of Common Pleas, plaintiffs

moved for a voluntary dismissal[1] without prejudice on June 22, 1989 and exactly two years later commenced this action asserting diversity jurisdiction.[2] On November 14, 1990, plaintiffs were served with requests for admissions and those requests went unanswered. On April 10, 1991, some four months later, the Court granted defendant's motion for an order journalizing the unanswered

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[1]The action was originally filed on January 28, 1988. On June 22, 1989 plaintiffs filed for a voluntary dismissal. Prior to the motion for dismissal, General Motors had filed a motion to dismiss for want of prosecution. The Setolas then moved out of state and refiled this action on the last date allowed under the Ohio savings statute.

[2] Plaintiffs, originally residents of Ohio, moved to New Jersey where they now reside.

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admissions[3] and the Court denied plaintiffs' motion for an extension to respond to the requests for admission. Docket No. 19.

Thereafter, on the basis of the journalized admissions, the Court granted defendant's motion for summary judgment and dismissed General Motors

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[3] Request for Admission No. 1:
Please admit that there was and is no contract between plaintiffs and General Motors Corporation in respect of this 1985 Corvette.

Request for Admission No. 2:
Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant GM.

Request for Admission No. 3:
Please admit that this 1985 Chevrolet Corvette was not defectively manufactured by defendant GM.

Request for Admission No.4:
Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.

See Docket No. 15,Exhibit A at pp.5,11, 12, and 21.

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from the case. See Docket No. 55, dated November 4, 1991. ONe month later, Bob Schmidt moved for summary judgment and plaintiffs submitted their opposition thereto. On June 17, 1992, plaintiffs moved for withdrawal and or amendment of the admissions and sought to vacate the summary judgment in favor of General Motors. The Court denied plaintiffs' motion as well as a subsequent motion for reconsideration. See Docket No. 83. In addition, the Court granted Bob Schmidt's motion for summary judgment and terminated the case. Id. Plaintiffs' now move to alter or amend the judgment and alternatively move for reconsideration.

First, it appears to the Court that plaintiffs are moving for reconsideration of orders which have already

reconsidered issues involving the withdrawal of admissions and summary judgment granted to General Motors. See Docket Nos. 71 and 83. As these issues have already been reconsidered and denied, the Court finds plaintiffs' motion not to be well taken and denies the same.

Second, plaintiffs' move for reconsideration of the summary judgement granted to Bob Schmidt on October 14, 1992.

While a motion for reconsideration is not mentioned in the Federal Rules of Civil Procedure, it serves a legitimate and valuable role in certain situations. National Union Fire Ins. Co. v. Continental Illinois Corp., 116 F.R.D. 252, 253 (N.D. Ill. 1987), citing Above the Belt, Inc. v. Mel Bohannan

Roofing, Inc., 99 F.R.D. 99 (E.D. Va. 1983). Generally, there are three major situations which justify a court reconsidering one of its orders:

> (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or to prevent manifest injustice.

Kern-Tulare Water Dist. v. Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986), aff'd in part, rev'd in part 828 F.2d 514 (9th Cir. 1987), cert denied, 486 U.S. 1015 (1988).

The motion for reconsideration must demonstrate to the court why it should reconsider its decision and set forth strongly convincing facts or law which would induce it to reverse its prior decision. Shields v. Shetler, 120 F.R.D. 123, 126 (D. Colo. 1988). Motions for reconsideration are not sub-

stitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings. Karr v. Castle, 768 F. Supp. 1087, 1093 (D. Del. 1991), citing Brambles U.S.A., Inc. v. Blocker, 735 F. Supp. 1239 (D. Del. 1990).

In the present case, plaintiffs' sole argument in favor or reconsideration assumes that the withdrawal of admissions is successful. As stated above, this Court has already spoken on that issue and has determined that it does not warrant a second reconsideration. Accordingly, plaintiffs' motion for reconsideration regarding this Court's granting of summary judgment in favor of defendant Bob Schmidt is not well taken.

Finally, in light of the above, plaintiff's motion for leave to file instanter the affidavit of Ervin Leshner and to file a supplemental memorandum regarding the motion for reconsideration is denied as moot.

IT IS SO ORDERED.

(s) David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. DISTRICT JUDGE

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FILED
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CLERK US DISTRICT COURT
FOR NORTHERN DISTRICT OF
OHIO, WESTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRANK SETOLA,
et al.,

Plaintiff, Case No. 3:90CV7317

-vs-

BOB SCHMIDT CHEVROLET,
INC., et al.,

Defendant.

OPINION AND ORDER

WALINSKI, J.

This matter is before the Court on plaintiffs' motion for reconsideration, Bob Schmidt and General Motors' motions to strike plaintiffs' motion for reconsideration and plaintiffs' motion for leave to file affidavits. Also before the Court are defendant's motion for summary judgment, defendant's motion to strike affidavits, plaintiffs' motion

for leave to file and plaintiffs' third motion for extension of time and replies thereto. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

Plaintiffs seek reconsideration of this Court's August 4, 1992 Memorandum and Order wherein their motion for withdrawal of admissions was denied. While a motion for reconsideration is not mentioned in the Federal Rules of Civil Procedure, it serves a legitimate and valuable role in certain situations. Nat'l Union Fire Ins. Co. v. Continental Illinois Corp., 116 F.R.D. 252, 253 (N. D. Ill. 1987), citing AboveThe Belt, Inc. v. Mel Bohannan Roofing, Ind., 99 F.R.D. 99 (E.D. Va. 1983).

Generally, there are three major situations which justify a court reconsidering one of its orders: "(1) an in-

tervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or to prevent manifest injustice." Kern-Tulare Water Dist. v. Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986), aff'd in part. rev'd in part 828 F. 2d 514 (9th Cir.), cert. denied 486 U.S. 1015 (1988). However, the motion for reconsideration must demonstrate to the court why it should reconsider its decision and set forth strongly convincing facts or law which would induce it to reverse its prior decision. Shields v. Shetler, 120 F.R.D. 123, 126 (D. Colo. 1988). Motions for reconsideration are not substitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings. Karr v. Castle, 768 F.

Supp. 1087, 1093 (D. Del. 1991), citing Brambles U.S.A., Inc. v. Blocker, 735 F. Supp. 1239 (D. Del. 1990).

In the case sub judice, plaintiffs presents no justifiable reason for consideration of the previous decision. Instead, plaintiffs' argue that defendants' motion to journalize the admissions came as a surprise as GM failed to utilize Local Civil Rule 3.04[1] to convey the seriousness of the admissions. Coun-

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[1] Local Rule 3.04 reads in pertinent part:

> To curtail undue delay in the administration of justice, no discovery procedure . . .to which objection or opposition is made by the responding party shall be taken under consideration by the Court unless the party seeking discovery shall first advise the Court in writing that, after personal consultation and sincere attempts to resolve differences, the parties are unable to reach an accord..

(emphasis added). The Court notes that the Local Rules were amended as of January 1, 1992.

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sel for plaintiff indicates that had this procedure been implemented, "the matter would have been worked out". However, counsel for plaintiffs should be aware that requests for admissions and response time thereto is clearly addressed within the Federal Rules of Civil Procedure and does not require more of opposing counsel before seeking journalization of admissions. Plaintiffs' Motion for reconsideration is not well taken. Accordingly, defendants' motions to strike the motion for reconsideration and plaintiff's motion for leave to file affidavits in opposition to the motions to strike are denied as moot.

The Court now turns to Bob Schmidt's motion to strike the affidavits of Frank Sedola and Alan J. Karoly. It is Bob Schmidt's contention thatthe Af-

fidavits do not meet the requirements of Rule 56(e) and cannot be considered in opposition to the motion for summary judgment.

Rule 56(e) states in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn to certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

As to the three requirements regarding affidavits submitted in opposition to a motion for summary judgment, Bob Schmidt argues that plaintiff's affidavit devoid of personal knowledge as it is written in the third person and is therefore not a sworn statement of the affiant. Defendant also states

that the affidavit, even if cured of this defect, does not contain any admissible evidence sufficient to oppose the motion for summary jdugment.

A review of Setola's affidavit finds that it differs in form to that of a traditional affidavit but nevertheless contains the sworn affirmation of the affiant as to its contents on the last page. While the majority of the affidavit is written in the third person, that factor alone cannot render the affidavit defective as Setola avers the statements contained therein as his own.

However, whether the affidavit contains admissible evidence sufficient for the Court's consideration is a different issue altogether. The rule is clear that information contained within the affidavit must be within the

affidavit must be within the personal knowledge of the affiant. Fed. R. Civ. P. 56(e). However, such information cannot be based on a belief as it would constitute speculation and be inadmissible in court. Schertz v. Waupaca County, 875 F.2d 578, 582 (7th Cir. 1989). Conclusions of law are not appropriate within an affidavit. 6 J. Moore & J. Wicker, Moore's federal Practice ¶56.22 [1] (2d ed. 1988). However, where the court can separate the conclusions and speculation from the admissible evidence, it may strike those portions of the affidavit Id. ..

In this case, the Setola's affidavit is a running narrative replete with self-serving declarations, speculation and inadmissible "evidence" running some twenty-eight pages long and

containing a portion of second affidavit. The Court need not wade through and excise the stricken portions where such speculation is intertwined throughout the entire affidavit. Accordingly, the Court finds Bob Schmidt's motion to be well taken and Frank Setola's affidavit is hereby stricken.

Second, Bob Schmidt requests that Alan J. Karoly's ("Karoly") affidavit be stricken as it also fails to comport with the mandates of Rule 56(e). First, defendant takes issue with Karoly's competency as an expert. Karoly identifies his auto mechanic experience and certification as a Master Automotive Technician by the National Institute of Automotive Service Excellence ("ASE"). HE further states that he worked as a mechanic for a local dealer for some two

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and one half years before starting his own towing business in 1986. While Karoly's qualifications regarding his expertise of braking systems is minimal, he has not demonstrated knowledge of Corvette braking systems which would render his opinion that of an expert. His statement that he has "worked on Corvettes and their brake systems" is not a sufficient basis to warrant expert status. For these reasons, the Court finds defendant's motion to be well taken and will strike Karoly's affidavit.

The Court now turns to Bob Schmidt's motion for summary judgment and give a brief recitation of the facts. This case was filed in this court in June 1990 after having been voluntarily dismissed the action in state court.[2] Frank Setola bought a 1985 Chevrolet

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juries incurred as a result of the accident. Bob Schmidt has filed for summary judgment and plaintiffs' submit their opposition thereto.

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The jdugment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. United States v. Articles of Device, 527 F. 2d

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(Footnote #2)

[2] Originally filed in the Court of Common Pleas in Lucas County, plaintiffs filed for a voluntary dismissal without prejudice on June 22, 1989. Thereafter, on June 22, 1990, plaintiffs filed this diversity action against the same defendants.

Corvette from Bob Schmidt on December 3, 1985 and alleges that he experienced brake problems and returned the car to the dealer for repairs. The last repair work done by Bob Schmidt is dated as January 23, 1986. Setola states that he relied upon the dealer's representation that the car was fine to drive. On January 30, 1986 Setola was involved in an accident with the vehicle and was cited for failure to maintain an assured clear distance. Plaintiff and his wife assert a products liability and negligence claim against the dealer for in-

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1008, 1011 (6th Cir. 1976); Tee-Pak, Inc. v. St. Regis Paper Co., 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. Smith v. Pan Am World Airways, 706 F.@d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses."

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on

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file, designate specific facts showing a genuine issue for trial. Celotex Corp. v. Catrett 477 U.S. at 324.

In bringing a negligence action, the plaintiff must establish 1) a duty; 2) a breach of that duty; and 3) an injury which proximately results from the breach. DiGildo v. Caponi, 18 Ohio St.2d 125, 247 N.E. 2d 732 (1969); Menifee v. Ohio Welding Products, Inc., 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). To defeat a motion for summary judgment, the plaintiff must identify the duty owed and the evidence must be sufficient to allow reasonable minds to infer that the duty was breached which proximately caused plaintiff's injuries. Keister v. Park Centre Lanes, 3 Ohio App.3d 19, 22-24 (1981).

The Setolas have submitted that there is a duty by a service department when repairs are undertaken and a vehicle is re-

turned for use to the owner. Sonja P. Soehnel, Annotation, Product Liability: PErsonal Injury or Death Allegedly Caused by Defect in Braking System in Motor Vehicle, 99 A.L.R. 3d 179 (1980). Plaintiffs next assert that Bob Schmidt breached this duty by selling him a defective vehicle and failing to repair the brake problems prior to the accident. In support of this, Setola states in answers to Bob Schmidt's interrogatories that the car was taken back to defendant's shop three times for problems with the vehicle's brakes.

The first repair order dated 12/9/85 gives no indication of brake problems. The work done according to the repair order dealt with adjsuting the timing, performing injector balance test and ordering injectors. Defendants' Exhibit B. The second work order dated 12/19/85 indicates problems as being

"rear brakes lock up" and "rear axle lks". The car mileage was 3233. However, the service manager's affidavit states that the work order was voided as plaintiff was unable or unwilling to wait for the repair work. The third repair order was dated January 23, 1986 with the car mileage reading 7194. The complaints listed included rattles in the dash, door shutting hard, transmission shifting too soon, car stalling, coolant leak, horn and alarm won't operate among others. Most pertinent to this discussion is the notation "Ck for rear axle lk" and "left rear wheel and wheel seeming to lock up at times". This is followed by the dealer's conclusion "No leaks at this time". The repair order also indicates that the vehicle was road tested and the service manager avers that it is the standard and ordinary custom of their dealership to test the braking system of a vehicle before turn-

ing it back over to the owner.

Plaintiff's contention is that defendant failed in its duty to repair the car, but no evidence properly before the Court demonstrates that defendant breached its duty. More troublesome to plaintiff's case, however, is the element of proximate cause.

In Jeffers v. Olexo, supra, the court described proximate cause as:

> 'That which immediately precedes and produces the effect as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated. '. . .

Id. at 143. (citations omitted).

Defendants submit the affidavit of Nancy McCray, an eyewitness to the accident in question. McCray's vehicle was in front of the car impacted by the Setola vehicle. It was McCray's observation that the Setola

vehicle was approaching at a high rate of speed so much so that it would not have been able to stop before hitting the car behind her. Bob Schmidt also submits Officer Thomas G. MEdon's deposition as Officer Medon investigated the collision. The police report corroborates McCray's affidavit and indicates that Mr. Setola was cited for failure to maintain assured clear distance. In his deposition, Medon did recall that Mr. Setola mentioned brake problems prior to the accident. However, Medon stated that there was no demonstrable indication that the vehicle was at fault which resulted in the citation to plaintiff.

In addition, defendants cite to the affidavit and report of Lawrence F. Wilson as supporting a finding of summary judgment for Bob Schmidt. Wilson, a professional engineer, was secured by plaintiff's insurer to investigate the claim of brake failure.

Wilson's report states that the brake fluid in the master cylinders and wheel cylinders was contaminated with mineral oil and further:

> In our opinion, the brake fluid contamiantion of mineral oil caused the distortion of the master cylinder caps. It was impossible, however, to prove that this had any effect on the braking actions of the vehicle, because no distortions were found in the brake line hoses nor the wheel cylinder caps.

Doc. #70, Exhibit B. (emphasis added).

Finally, admissions by the plaintiffs are offered by Bob Schmidt as evidence that the issue of causation is clearly not a question of fact:

> Request for Admission No. 4: Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.
>
> Response: Deemed admitted and journalized.

Plaintiffs argue that this judicial admission cannot provide comfort to Bob Schmidt

as it was sought by GM. However, the complaint with its allegations of product liability was as against both Bob Schmidt and GM. The fact that one defendant sought an admission does not preclude its use against the second defendant especially when it goes to the same issue. Taking into account all the above presented evidence, it is clear that there is no genuine issue of material fact as to proximate cause. Furthermore, the undisputed facts even when viewed in a light most favorable to the plaintiff, clearly demonstrate that defendant is entitled to summary judgment on the negligence claim.

Finally, as to the product liability claim, the Court msut also find in favor of the defendant on the issue of proximate cause as there is an absence of evidence to the contrary. See, State Farm Fire Co. & Casualty v. Chrysler Corp., 37 Ohio St. 3d 1,

5-6, 532 N.E.2d 489 (1988) (PReponderance of the evidence in a products liability claim must demonstrate that the defect was the direct and proxiamte cause of the plaintiff's injuries.)

Accordingly, it is

ORDERED that plaintiffs' motion for reconsideration is denied.

FURTHER ORDERED that defendants' motions to strike the motion for reconsideration is denied as moot.

FURTHER ORDERED that plaintiffs' motion for leave to file affidavits in opposition to the motions to strike is denied.

FURTHER ORDERED that defendants' motion to strike affidavits is granted.

FURTHER ORDERED that plaintiff's motion for extension of time to file additional affidavits in opposition to motions to strike is denied.

Cause dismissed.

(s) Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

TOLEDO, OHIO
October 14, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FRANK SETOLA, et al.,

Plaintiff,

vs.

BOB SCHMIDT CHEVROLET, Inc., et al.,

Defendant.

FILED:AUG 4 '92
AM10:28
CLERK U.S. DISTRICT COURT,NORTHERN DISTRICT OF OHIO
TOLEDO

Case No. 3:90 CV7317

MEMORANDUM AND ORDER

WALINSKI, J.

This matter is before the Court on plaintiffs' motion for withdrawal of admissions and motion to vacate summary judgment. Defendants submit their opposition thereto. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

This is a products liability action wherein Frank and Cheryl Setola ("Setola" allege claims sounding in negligence and strict liability against Bob Schmidt Chevrolet, Inc. ("Bob Schmidt") and General Motors Corporation ("GM"). There is no dispute that on November 14, 1990, GM served plaintiffs with discovery requests. Contained within the discov-

ery request was a request for admissions. GM then moved the Court for an order journalizing these admissions on March 18, 1991. Plaintiffs responded by requesting an extension of time to respond to the request for admissions. Up until this time, plaintiffs neither responded nor requested an extension of time.

This Court, on April 10, 1991 granted the motion to journalize the admissions and deemed them admitted. In addition, plaintiff's motion for an extension of time was denied. Shortly thereafter, GM moved for summary judgment based upon the deemed admissions to which plaintiffs filed an opposition and several affidavits in support. On November 4, 1991, the Court granted GM's motion for summary judgment and dismissed GM as a party defendant. One month later, Bob Schmidt also filed for summary judgment and that motion is also pending

before this Court. On June 17, 1992 plaintiffs filed their motion for withdrawal or to amend the admissions and to vacate the summary judgment order as to GM.

Rule 36(b) states in part:

> Effectof Admission. Any matter admitted under this rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the Court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Fed. R. Civ. P. 36(b). (emphasis added). The Court is permitted to exercise its discretion when considering the withdrawal or amendment of an admission. J. Moore & J. Lucas, 4A Moore's Federal Practice ¶36.08, 36-77 (2d ed. 1992). Two considerations for the Court include 1) whether presentation of the merits of the action will be served by

withdrawal; and 2) the party who obtained the admissions must satisfy the court that withdrawal will prejudice maintaining a defense. Id. at 36-78.

The court in U.S. v. Kasuboski, 834 F.2d 1345 (7th Cir. 1987) elaborated upon the purpose of the rule:

> Rule 36 allows parties to narrow the issues to be resolved at trial by effectively identifying and eliminating those matters on which parties agree. This function would be lost if aprties were permitted to contest under Rule 56 a matter concluded under rule 36. As the advisory committee observed, "[u]n]less the party securing an admission can depend on its binding effect, he [or she] cannot safely avoid the expense of preparing to prove the very matters on which he [or she] has secured the admission, and the purpose of the rule is defeated." Fed. R. Civ. P. 36 advisory committee's note.

Id at 1350. The defendants in Kusaboski, sought to attack default admissions by way of opposing the plaintiff's motion for summary judgment. The court took issue with defendants' failure to utilize the proper procedural vehicle before affirming sum-

mary judgment in favor of plaintiff. In the present case, the motion to journalize the admissions was decided before GM's motion for summary judgment was filed. NEvertheless, plaintiffs also tried to dispute the admissions within their opposition to the motion for summary judgment but the Court granted summary judgment to GM on November 4, 1991. Seven months later plaintiffs filed this motion to withdraw.

Plaintiffs assert they will suffer a manifest injustice should the Court deny them the requested relief. Certainly the deemed admissions cut at the heart of plaintiffs' claims and allowed GM to succeed on its motion for summary judgment. However, the Court must also consider the prejudice, if any, which may befall GM.

Plaintiffs place great emphasis on the assertion that defendants have the burden of demonstrating prejudice by virtue of lost evidence. GM disputes this statement

arguing that the loss of evidence may be a factor in establishing prejudice to its case. This Court agrees. The party opposing the withdrawal must demonstrate that it will be prejudiced in maintaining a defense. See 999v. C.I.T. Corp., 776 F.2d 866 (9th Cir. 1985). In this case, GM relied upon the journalized admissions when it submitted its motion for summary judgment on June 12, 1991. In fact, the docket sheet indicates that any discovery on the part of GM ceased after the filing of Officer Thomas G. Medon's deposition. See, Docket Nos. 25 and 26. Certainly, after GM prevailed on the motion for summary judgment and was dismissed from the case, it would not be expected to continue to prepare its case. At this point, seven months after the admissions were deemed admitted, GM relied upon the effect of the admissions and assumed that its role in this case was con-

cluded. For plaintiffs to submit their motion to withdraw admissions seven months after GM was dismissed from this case and fourteen months after the journalized admissions were deemed admitted would no doubt prejudice defendant's case.[1] Cf. Howard v. Sterchi, 725 F. Supp. 1572 (N.D. Ga. 1989) (Court granted plaintiffs' motion to withdraw made 14 months after the admission and one month after defendants filed for summary judgment. Defendants were awarded costs and expenses incurred as a result of their reliance on the admissions).

Even where the requirements under the rule favor the movant, the Court may exer-

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[1] The Court also notes that plaintiffs' responses to GM's first set of interrogatories served on November 14, 1990 were returned on June 10, 1992.

cise its discretion in disallowing withdrawal of admissions. Kleckner v. Glover Trucking Corp., 103 F.R.D. 553, 557 (M.D. Pa. 1984); Donovan v. Carls Drug Co., 703 F.2d 650, 652 (2d Cir. 1983). The purpose of admissions is to facilitate proof and narrow the issues. Fed. R. Civ. P. 36 advisory committee's note. The Court recognizes the importance of resolving the action on the merits but in this case finds that the reliance of GM upon the deemed admissions, plaintiff's dilatory actions, and the purpose of admissions would be severely undermined were the Court to allow withdrawal at this late date. Accordingly, the Court, in its discretion, finds plaintiffs' motion not well taken and also denies the its decision granting summary judgment to GM.

Therefore, it is

ORDERED that plaintiffs' motion to permit withdrawal and/or amendment of ad-

missions against plaintiffs on General Motors requests for admissions is denied.

FURTHER ORDERED that plaintiffs' motion to vacate interlocutory summary judgment in favor of General Motors is denied.

(s) Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

TOLEDO, OHIO

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Frank Setola, et al.,

Plaintiffs,

vs.

Bob Schmidt Chevrolet, Inc. et al.,

Defendants.

* CASE No. 3:90 CV7317

* JUDGE NICHOLAS J. WALINSKI

* AFFIDAVIT OF FRANK F. SETOLA SUBMITTED BY SUMMARY JUDGMENT MOTIONS.

* John G. Rust
* 4628 Lewis Ave.
* Toledo, Ohio 43612
* (419) 476-0347
* Attorney for Plaintiffs
* O.S.CT.#0000098

* * * * * * * *

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit is served upon Counsel for the Defendants, Bob Schmidt Chevrolet, Inc., Attorney Marcia A. Wagner, One SeaGate, Suite 710, Toledo, Ohio

43604, and Attorney Ray A. Farris, for General Motors, Fuller & Henry, One SeaGate, Suite 1700, Toledo, Ohio 43603, by First Class U.S. Mail this 1st day of July, 1991.

(s) John G. Rust
John G. Rust Attorney

State of New Jersey)
SS
County of

AFFIDAVIT OF FRANK F. SETOLA, JR.

Frank F. Setola, Jr., being first duly sworn, deposes and states that this Affidavit is true to the best of his recollection, and of his personal knowledge:

1. I, Frank F. Setola, Jr., purchased from Bob Schmidt Chevrolet, Inc., Defendant herein, a new 1985 Chevrolet Corvette, as shown by the retail installment sale contract, attached hereto, as Exhibit A and was given the warranty and other papers entitled "Silver Medallion customer delivery receipt, with "warranty and owner assistance Information booklet", as shown on Exhibit B with the odometer statement of 92 miles.

2. In my use and in regard to the repairs on the said Corvette, the only garage was Bob Schmidt Chevrolet, Inc. which did any work on the said Corvette before the uncalled for collision of January the 30th, 1986, when because of the brakes' failure, I was unable

to stop the car, and struck a car ahead on the Anthony Wayne Trail, Southbound, at City Park, Toledo, Ohio. If it had not been for the failure of the brakes, I would not have hit this car, as I was not going fast whenever I first saw the lady's car stopped up ahead, and I would have stopped, but when I pressed hard on the brake, the brake would not do anything; and the brake pedal would not go down, and I had to do what I could, and I did, in trying to slow the car down by the compression and transmission was unable so to do.

3. As stated above, this Corvette was not worked on by any other garage, or repair people, except the Bob Schmidt Chevrolet, Inc., from the time that I got it, until the time of the aforesaid collision.

4. I further state that this car was taken back <u>at least</u> 4 times to Bob Schmidt Chevrolet, hereinafter referred to as Bob Schmidt, before the said collision of Jan-

uary the 30th, 1986. In the statements that I made in the "Plaintiffs' Supplemental Answers to Bob Schmidt Interrogatories and Request for Production of Documents", are true and I refer specifically, to page "_6C_ and page _6D_ and 6E_", copies of which are attached hereto and made a part hereof and also page 66I_ in my handwriting.

Statement of History of Condition of Damaged Corvette, After Collision of January the 30th, 1986

5. From the scene of the accident, I had the car towed, as is, to the Five-Point Road near Maumee, where I was staying, by one JErry Sybert. AFter the collision, the hood was so damaged, that one could not pull it up nor open the hood. The hood was not opened, until later at the American Customs, then, I was present, and I believe Mr. Clarence Werner, and possibly others were then present. I know that the hood was in the same condition when finally the car was towed to the American Customs, in Toledo, Ohio, in the

CONTINUATION OF ANSWER TO INTERROGATORY 8

B. December 19, 1985, Bob Schmidt Work ORder or invoice, 56862, with problems and failures to function, reported as "Rear brakes lock up, Rear Axle locks - at times loud tapping noise in engine - Very poor gas mileage and stalls and stops - all indicating serious brake problems and brakes locking and entine not turning over freely due to faulty brakes, engine running hot due to wheels not turnign freely, and

C. Again on or about January we, 1986, when the said Corvette was seen by Bob Schmidt to have the same problems as before, same brake failures, poor gas mileage, car stalling out due to brakes locking, rear axle lock, and which seems to lock up at times, and also, Corvette had vibrations in car when over 45 mph, seems to be rear, again indicating brakes locking and not func-

first part of February, 1986, as it had been immediately after the collision, and that the hood had not been raised. Likewise, know that there was no change to occur on the appearance of the outside of the engine parts, from the time that the hood was first opened, at American Customs, until the car was taken to the Dave White Chevrolet, and that likewise, then, there was brake work done at the Dave White Chevrolet, as reported by professional Engineer Lawrence F. Wilson, President, Product Analysis and Structural Testing, Inc., as shown in his report, No. 209586.

Statement of History of Failure of Corvette To Function As Intended and Warranted; and Denial of NOrmal Use of Corvette

The Corvette was in Bob Schmidt Chevrolet, Inc. for repairs, for these times at least, being the following:

Work Order No:

1) 56387 12/9/85 to
2) 56862 12/19/85 to Rear brakes axle locks. lock up, Rear
3) 1/4/86 to 1/
4) 1/16/86 to 1/ /86
5 57828 1/23/86 to 1/ /86

tioning as intended nor properly, wheels locking; and again "balance four wheels, R&R Cust. wheel locks";

Answering further to Interrogatory No. 8, Plaintiffs state that Bob Schmidt was negligent, and acted in bad faith, recklessly, and dangerously, in on receiving information shown on the said invoices and Work Orders of December 9, 1985, December 19, 1985, and January 23, 1986, should have inspected the fluid in the Corvette's brake system, by checking the Master Cylinder, and then the danger of the swelling of the seals in the proportion valve, the Master Cylinder and other parts of the brake system would have shown that the brake fluid in the brake system was contaminated, just as was seen and evidenced by the not to be expected color, reported by Engineer L.F.Wilson as "Grayish", of the brake fluid scattered over the engine, when the hood was first opened at American Customs, after the fateful collision of Jan-

uary 30, 1986 on the Anthony Wayne Trail.

CONTINUATION OF ANSWER TO INTERROGATORY 8

While Mr. Setola was in New Jersey, the Corvette kept on dying every time he touched the brakes it would die, at a corner, when he put his foot on the brakes, and when the car went through a stop sign in New Jersey, and he had it towed back to Bob Schmidt, due in part at least to the bad brakes. At Bob Schmidt's Chevrolet he arrived there around January the 4th, 1986. And the Corvette was returned to him around January the 15th, 1986; and then the Corvette, same car, was back with Bob Schmidt January the 16th the next day, brakes not working; brakes were squeaking very loudly, would not stop at a full stop; very hard pressure to stop the car; almost impossible at certain speeds downshifting was the only way to slow down.

And on January the 29th, 1986 Bob Schmidt's telephoned Mr. Setola approximately 4:30 in the afternoon to pick up his vehicle.

He did. Drove it to his Mother's residence about one and one half blocks away, and he immediately called back to Bob Schmidt's telling them that the car would, was not stopping, acted very strange, pulling to the side, making all kinds of noises; and on January the 29th the car was returned, the brakes were not functioning any better, nor did the brake pedal go down or respond when the pressure was applied - - all work under warranty and Bob Schmidt told Mr. Setola that Mr. Setola was just imagining problems, that there were no problems. Told him to test drive it the next morning; he did, and decided to take the Corvette in to Bob Schmidt's, after he took his wife to work in downtown Toledo. At that time the brakes were straight up, nothing to move, couldn't push it down; Mr. Setola called Bob Schmidt and was again told that it was all in Mr. Setola's imagination. As the car was operated, it made all kinds of metal sounds, loud humming

noises, and the car would shake.

CONTINUATION OF ANSWER TO INTERROGATORY 8.

I was in NJ about December 29, 1985 where I was having problem with my Corvette. The brakes were not functioning properly; had to push hard to stop vehicle, car, then, would stall. This took place in NJ. Took car into "Town & County Chevrolet" of Tom's River, NJ. Service Managers, Mike and Jerry, refused to work on 1985 Chevrolet Corvette due to the problems of the vehicle. They stated that I should bring vehicle back to original dealer - - "Bob Schmidt Chevrolet of Toledo, Ohio." The car then had to be towed from NJ to the dealer "Bob Schmidt Chevrolet of Toledo, Ohio". When I got back into Ohio I went to the Service Dept. of 'Bob Schmidt Chevrolet" and told Service Manager that the car kept dying when I had applied brakes and car was hard to stop, peddle was hard to push.

(Retail Installment Contract and GM "Customer Delivery Receipt" of 12/3/85, omitted

AFFIDAVIT SIGNATURE PAGE

Have you read your foregoing Affidavit of ____ number of pages, including this page? x _____

Do you swear before me, a Notary Public, State of Ohio that your statements, to the best of your recollection are true?

yes
yes

(s) Frank F. Setola
Signature of Affiant

Sworn to before me and subscribed in my presence this 29th day of June, 1991.

(s) Joseph Apicelli

JOSEPH APICELLI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 5, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Frank Setola, et al.,

Plaintiffs,

vs.

Bob Schmidt Chevrolet, Inc., et al.,

Defendants.

FILED 92 JAN-7 PM 4:13
Clerk U.S.DISTRICT COURT NORTHERN DISTRICT OF OHIO TOLEDO

Case No. 3:90 CV7317

Judge Nicholas J. Walinski

AFFIDAVIT OF FRANK F. SETOLA SUBMITTED BY PLAINTIFFS IN OPPOSITION TO SUMMARY JUDGMENT motions.

John G. Rust
4628 LEwis Avenue
Toledo, OHio 43612
(419) 476-0347
O.S.CT. #0000098
Attorney for PLaintiffs

A copy of the foregoing Affidavit is served upon Counsel for the Defendants, Bob Schmidt Chevrolet, Inc., Attorney Marcia A. Wagner, One Seagate, Suite 710, Toledo, Ohio 43604, and ATtorney Ray A. Farris, for General Motors, Fuller & Henry, One Seagate, Suite 1700, Toledo, Ohio 43603, by First

Class U.S. Mail this 7th day of January,

(s) John G. Rust

John G. Rust
Attorney for Plaintiffs

AFFIDAVIT OF MR. FRANK F. SETOLA

REPRESENTATIONS AND STATEMENTS BY MR. TRAVIS NEELY, BOB SCHMIDT, SALESMAN

The title papers, and the various purchase papers for the 1985 Corvette, purchased by Mr. Setola, from the Bob Schmidt Chevrolet Company, have a number of dates of December 3, 1985. On the day before Mr. Setola signed the final purchase papers, he test drove, a gray Corvette, and it ran and performed fine, without any complaints or notice to Mr. Setola of any defects whatsoever. The next day, Mr. Setola came back, in the afternoon as he recalls, and then, asked to test drive the Corvette which was being looked at by Mr. Neely and him. As MR. Setola test drove the Corvette and MR. Neely was with him, Mr. Setola told him that the brake pedal did not press down like a brake pedal ordinarily does,

and that it was hard and that it would only go down about one-quarter of an inch. MR. NEely said that Corvettes were made like that. LIkewise, Mr. Setola told Mr. Neely that in pressing the brake pedal, that he had to press harder than he would on other cars, and MR. Neely said that that was the way the Corvette was made and works. MR. Neely said to drive it like that, and it will start loosening up. Mr. Neely also said, "This is a new car; it's the best car that Chevrolet makes, it runs perfectly, and if anything develops with the car, we'll make good on it, just as we have made good on other cars before, that you have purchased from us."

Mr. Setola states that on prior deals, that Bob Schmidt had made good on everything that they said they would, made good, in regards to the condition of the car, as regard to everything else. MR. Setola then decided to buy the new car as a new car and so relied up the statements by Mr. Travis

Neely. From what Mr. Neely said, Mr. Setola, thought that the brakes were in their good, operating condition, and were operating just as General Motors and the Chevrolet company expected, this Corvette, and all Corvettes to operate, when they were new like this.

(2)

FIRST COMPLAINTS ABOUT CORVETTE TO BOB SCHMIDT CHEVROLET

DECEMBER 5, 1985

Mr. Setola recalls, that about two days, after he had purchased the car, he drove the car to Loma Linda, Airport Highway, just east of the Toledo Airport, north side of Airport Highway, generally in the area of the Ohio State Police Station. Mr. Setola was there to meet his friend, Bob, last name now not recalled.

Bob was already int he parking lot, and Frank was going to drive his Corvette to take Bob back to Bob's house before they ate. Frank tried to start the Corvette; it would not start. The starter was turning over the

engine real slow. Mr. Setola then called Mr. Travis Neely at Bob Schmidt. MR. Neely said they would send a tow truck out right away to get the car. About forty-five minutes later, the tow truck came. The tow truck driver came inside Lima Linda's found Mr. Setola, and all four men went back out to the Corvette. The Bob Schmidt tow truck man drove the Corvette away on a flat bed truck. Mr. Setola rode in the tow truck, back to Bob Schmidt. MR. Setola went right to Mr. Travis NEely. Mr. Neely said that he would take care of the problem, not to worry about it. Bob then dropped Mr. Setola off at Mr. Setola's mother's place, Mrs. Barbara Davis, 333 Rexham Lane, Maumee, Ohio 43537. Then, under two hour's time, Mr. Travis Neely called Mr. Setola and told Mr. Setola that he could pick up the car, and the Bob Schmidt mechanic said that the injectors were off balance, and this was his explanation of the problem that the Corvette had been facing.

/(End of p.3)

Coming back to a description of how the car had performed, Mr. Setola said that from the very first time that the had received the car, that it had not functioned nor run like the first Corvette which he had test driven. As to the Corvette in question, which he had bought, and was tendered by Bob Schmidt, Mr. Setola had continued to notice that the car had not sounded right, nor run like the car which he had test driven. When he had driven into Loma Linda's, he had made right hand turn, and at that time, the car had stalled and died. He then re-started it, with difficulty, and after it had turned over a few times. HE then parked the car, then he met Bob as stated above, and the Corvette would not start, and this caused Mr. Setola to call Mr. Travis Neely at Bob Schmidt. At that time, at the Loma Linda, the Engine Light had not come on except as is normal, when you turn on the ignition.

The Corvette had then been returned

to MR. Setola on December 7, at the Bob Schmidt Chevrolet Garage. When he received the car from Bob Schmidt, Mr. Travis Neely and another person, walked to his car with him, Mr. Neely gave him the keys, said everything is fine, and Mr. Setola drove away. The next morning, Mr. Setola called back to talk to Mr. Travis Neely, told him that the car was presenting the same problems, that it had presented out at Loma Linda's. (End of p.4)

SECOND COMPLAINTS TO BOB SCHMIDT CHEVROLET ABOUT THE CORVETTE, DECEMBER 9, 1985

After MR. Setola had received the Corvette back on December 7, 1985, he stated that the car still failed to perform as it had failed to perform at the Loma Linda's. The car would stall out, whenever, he applied the brakes to stop the car, like at a stop sign or at a red light. He also states that from the very beginning, that the brake pedal had been harder than usual for a brake

pedal to depress or push down. He says also that when he made a sharp right hand turn, that the car would stall out. MR. Setola also noticed that the car after December 7, 1985, had started to have a humming noise in the rear, like metal grinding against metal. MR. Setola told Mr. Travis Neely all of this. Mr. Neely said, for Mr. Setola to bring in the car and he did. Then, when MR. Setola brought the car into Bob Schmidt's on December 9, 1985, he talked with Elle, a lady service writer, also to the other service manager, named Mike. HE told them all of the above to wit: After Mr. Setola had told Mr. Travis Neely of Bob Schmidt Chevrolet on December 9, 1985, as mentioned above, Mr. Travis Neely says words to the effect: All cars have problems, this car has got some problems, we'll take care of it. The car was left there, and to MR. Setola's recollection, it was picked up later that day. After Bob Schmidt had called him to tell him

the car was ready, he went there, MR. Setola then talked with Elle Schulelr, Mike. Mike the other service manager, and Travis Neely. Mike, the service manager, said they didn't have injectors, but would order them, and would call Frank setola when the injectors came in. That is the only thing they said was wrong with the car (End of p.5) Mr. Travis Neely had said drive it for a couple of days to see how it runs. Mr. Setola did, and brought it back to Bob Schmidt's on December 9, 1985.(End of P.6)

COMPLAINTS AND HISTORY OF THE CORVETTE PROBLEMS DECEMBER 9, 1985 TO DECEMBER 19, 1985

After December 9, 1985, MR. Setola noticed in the Corvette that the Corvette was making a humming noise in the back, a scraping noise, like metal against metal, identified only in the rear; there was an antifreeze leak, dome lights were not working, doors were starting to leak rain, the driver's seat would not move, the electrical

system in the car was not working right, and he was making numerous calls to MR. Travis Neely about these complaints.

Mr. Setola believes that he received the Corvette back from Bob Schmidt Chevrolet on December 9, 1985. While he is not sure, he believes that he then drove the Corvette to New JErsey. HE knows that he drove it to NEw JErsey, according to his recollection, sometime between December 9, 1985, and December 19, 1985. He recalls, he was in Seaside, NEw Jersey, came up to a red light, went to press the brakes, the brake pedal would nto go down, and he went through the red light. This scared him; about a mile down the road from where this happened, was the Town and Country Chevrolet, in Tom's River, NEw Jersey, The Town and Country Chevrolet is a big Chevrolet agency. Mr. Setola drove his car there, it was looked at by the Service Department, about an hour, and then the Service man told Mr. Setola

that they did not want to do any work on the car. Mr. Setola had told them that the car was making funny noises in the rear, that the car would not stop when he applied the brakes at a red light, and that the steering was shaking as he was driving; that is all that the can remember right now. He telephoned Bob Schmidt Chevrolet, and was unable to get Mr. Travis Neely, talked with some service department man, as he recalls, told them what he was facing, and they said to have the car towed back to Bob Schmidt. Town and Country Chevrolet then gave Mr. Setola the name of a tow truck place that would tow Mr. Setola's Corvette back to Bob Schmidt, and the car was towed there. Bob Schmidt refused to pay for the towing bill, saying it was not covered by the insurance. Mr. Setola paid the bill, the car was released to Bob Schmidt Chevrolet. The car was put into the Service Bay; and then the tow truck man left with his tow truck. This

tow truck man observed, as did Mr. Setola, a Service Department man for Bob Schmidt Chevroelt writing up a repair order for Corvette. (End of P. 7)

When the Corvette was brought back to Bob Schmidt, then, Mr. Setola, told the Bob Schmidt people, including the service repair order writer, that the brake pedal would not go down, the brakes had not functioned, causing him to go through a red light, that there were loud noises in the rear end of the car, that the steering wheel was shakey, when driving. Bob Schmidt Chevrolet had then looked at the car, they said there was nothing wrong with the car. Mr. Setola received the car back that day. Right there at Bob Schmidt Chevrolet, he drove the car, checked the brakes, and they seemed to be working better than they had in New Jersey, and he thought it was safe to drive the Corvette and did. One of the mechanics, at Bob Schmidt, a tall, skinny person, with a twitch

in his eye, said that he had test driven the Corvette, and that the car was fine. This was sometime around December 13, or December 14, 1985, as Mr. Setola recalls. Mr. Setola then drove the car, and in a couple of days, noticed that the brakes were not functioning properly, it was hard to push the pedal down, and that the rear end started locking up, and it (end of p. 8) was difficult to stop the car. Then the car locked up, it was difficult to accelerate, had to push the accelerator, or foot feed down. Somewhere along in here, MR. Setola was told by Mr. Travis Neely that he did not want to hear any more complaints, and then Mr. Setola, in keeping Bob Schmidt informed, talked with somebody in the Service Department.

About this time, sometime along the December or December 17 or 18, 1985, he was driving the car, when the left rear tire hits a hole in the road, blows out and puts the little spare tire wheel on. After the

tire blew out in the nighttime, Mr. Setola called them, the next morning, they stated that the tire was under warranty, and should be taken to a Goodyear dealer. Mr. Setola did, got a new tire from Goodyear. (End of p. 9)

STATEMENT OF DEALINGS WITH BOB SCHMIDT CHEVROLET DECEMBER 19, 1985

On December 19, 1985, Mr. Setola brought in the Corvette to Bob Schmidt Chevrolet, about 8:30 AM, after telephoning first to Mr. Travis Neely. He told him about all the complaints, that are shown on Repair Order 56862. MR. Setola was yelling and screaming about the complaints, and Elle brought Mike in. Mike said he would give a call in the afternoon as to when it would be finished.

Here, on Page 1, of Repair Order 56862 ont he left side under, "Part Number Description," there are some words written in and then stricken out. The question natur-

ally arises: What is shown by the words which were stricken out? Is this because fluid was put into the brake system which contaminated the fluids in the brake system?

Also, Mr. Setola points out that on the photo copies supplied by Attorney Marcia A. Wagner, that on the original first sheet for the first sheet of Repair Order 56862, there is handwriting under the, "Part Number and Description,", but on the same page, which is the third page, marked up at the top in the very left hand corner, "3-13", there is no such description about such part and Part Number and Description, and likewise, there is additional writing on the apparent Page 2 of 2 no explanation. On one copy of Page 2 of the December 19, 1985, work order are the words, in heavy black ink, "will have to take to Tire Co."

Why those words appear on one, and don't appear on another, and this also shows the need for a Deposition, as had been re-

quested before the close of the Discovery by Attorney Rust, of Attorney Wagner, and of Attorney Farris, and obviously there is a (End of P. 10) need now, to get to these matters. To resolve, whether such entires have any bearing on the introduction into the Corvette of a hydrocarbon mineral oil or other contaminant, and for other points as well. Likewise, there is a difference in the size of the writing in the words, "Void."

On the afternoon of December 19, 1985, Mr. Setola received a call from MR. Travis Neely. Mr. Setola went to the Bob Schmidt Chevrolet, and Mr. Neely said there was a problem. MR. Setola then, as requested, went to Bob Schmidt to discuss the matter.

Also on the December 19, 1985, work order 56862, on oen copy there is a delivery date of December 3, 1985, and on another copy of Page 1 of Work ORder 56862, there is no delivery date shown, and the same sheet has on upper right top a number with the last

three numbers, 304, whereas another copy has the number 504. Why the difference?

On Page 2 of Work Order 56862, there are the following words which are on one copy, but not both copies:

At top: "Will have to take to tire co"

At lower half: "HOrn inop. and cassette player eats tapes."

Mr. Setola and his attorney claim such discrepancies should be investigated by Depsoition. Someone put the contaminating oil into the brake system. General Motors or Bob Schmidt' These discrepancies raise a substantial question as to whether there are additional records, which have not been disclosed to Bob Schmidt's Counsel.

MR. Setola then went back to Bob Schmidt Chevrolet, talked (End of p. 11) with Mr. travis Neely and Mike, the other Service Manager, and Elle was present, but did not talk. At first, Mr. Neely said it would be two weeks for the car to be fixed, and then

MR. Setola said, "Fine. When can you start working on it?" Mr. Travis Neely said, "Four or five days, if not longer, because the parts were not there." MR. Setola became irate because he said he was having to go out of town. MR. Travis Neely said it was Christmastime, there were too many cars ahead of MR. Setola's to be fixed, and to bring the car back after the holidays, and then, when Mr. Setola asked for his car, then, the mechanic was still working on it, apparently, putting something back together, and then they gave him the keys to the Corvette and said, "HEre is your car; bring it back."

After Mr. Setola got his car back from Bob Schmidt on December 19, 1985, and he had the same problems that had caused him to bring the car in on December 9, 1985.

Mr. Setola met Cheryl Ann Krall on December 22, 1985. (End of p. 12)

STATEMENT OF HISTORY OF COMPLAINTS - CORVETTE DECEMBER 19, 1985 to JANUARY 23, 1986

MR. Setola says that basically the Cor-

vette was still showing the same brake problems that he had noticed from the very beginning. The brake pedal was hard to push down, but he was able to use it, to stop the car, although he also used downshifting to slow the car. Mr. Setola says that the brake pedal was harder to push down than it had been in originally at Loma Linda, and it took more to slow and stop the car.

There were metal noises coming from the rear of the car and the rear wheels were still locking; they would stop turning, then stop, and then start turning again, like something would grab them, then they would release, they would go again.

During this period of time, Mr. Setola went to New Jersey, worked some with his brother; while there, he had these problems mentioned above, with his car. He telephoned then to Bob Schmidt Chevrolet, talked with Mr. Travis Neely, who would then put him on the phone with a service manager,

and the service manager said that there was nothing wrong with the car. On the highway, when the car was being driven from New Jersey back to Ohio, the car would shake and vibrate at a highway speed of fifty miles per hour or over. (End of p. 13)

CONTACTS WITH BOB SCHMIDT CHEVROLET
JANUARY 23, 1986

Mr. Setola can remember making the complaint to Bob Schmidt Chevrolet that are reflected on the Work Orders, Bob Schmidt, for the January 23, 1986, work order No. 57828.

Mr. Setola states that he advised the Service persons who wrote up the work order, and with whom he was talking, that the brake pedal still worked hard, and the brakes were not functioning, and were hard to stopt he car. Bob Schmidt stated that they would check into it.

The car was in Bob Schmidt's from January 23, 1986, through January 29, 1986, when Mr. Setola received a call and picked up the car somewhere around 5:00 PM. When

Mr. Setola then talked with the service people, they said the car was operating all right, there was nothing basically really wrong with the car, nothing wrong with the brakes, they had tested everything and there was nothing wrong with the car.

Mr. Setola then drove the Corvette to his mother's place, at 333 Rexham, Maumee. Mr. Setola says that whenever the car was driven into the driveway at his mother's garage, that he applied the brakes, but the brakes did not stop the car. He then called into Bob Schmidt Chevrolet, told them that the brakes were not working. Bob Schmidt said that Mr. Setola did not know what he was talking about, there was nothing wrong with the car, just the drive the car, because there is nothing wrong with the car.

Then Mr. Setola drove the car to where he was living at Five Points Road, Perrysburg, Ohio, on the south side of Perrysburg. (End of p. 14)

STATEMENT OF EVENTS LEADING UP TO COLLISION
JANUARY 30, 1986

On Thursday, January 30, 1986, when MR. Setola tried to start the Corvette, it would not start. They had to jump start it with help from Chris Krall. After the car would not start, Mr. Setola called Bob Schmidt, told them that the car would not start, and Mr. Setola told Bob Schmidt that the brake pedal was hard to push down, the brakes were not working, and Bob Schmidt Chevrolet said that the car had been test driven for the brakes, the brakes were all right, the car was all right to drive.

In driving from Five Points Road, south of Perrysburg, into downtown Toledo, MR. Setola and his wife, Cheryl, drove the Corvette onto U.S. 475, and as they went along, coming to the place where U.S. 475 and I-75 split, there was a lot of traffic, MR. Setola had to apply the brakes. When Mr.

Setola hit the brakes, the brake pedal was hard, but it was braking the car. Then the car stalled and died out. MR. Setola had to push the car over to the side of the road, started it again. The car was making a humming noise, and a metal scraping noise. Also, the car was shaking, vibrating. The car was hard to steer. The loud noises or humming noises were like one metal grinding against another.

As Mr. Setola drove the Corvette from Five Points Road onto I-75 into downtown Toledo, when he got to downtown Toledo, MR. Setola states that as the car got near to downtown Toledo, that all four tires were smoking; and also, that the car did not seem like it wanted to roll, when he took his foot off the bas pedal. Everytime he took his foot off the gas pedal, the motor seemed (End of p. 15) it wanted to die, and the whole car would stop, and die and the car was very hot. All of the four tires were smoking.

Supreme Court, U.S.
FILED

(3)

No. 94 440 AUG 24 1994

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FRANK SETOLA,
CHERYL SETOLA,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET, INC.,

and

HYRDA-MATIC DIVISION,
GENERAL MOTORS CORPORATION,

and

GENERAL MOTORS CORPORATION,

Respondents.

APPENDIX FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR SIXTH CIRCUIT

VOLUME II

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SUPREME COURT, U.S.

John G. Rust, Esq.
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Attorney for Petitioners

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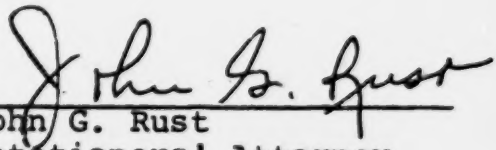
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CERTIFICATE OF SERVICE OF APPENDIX

Three copies of the above Appendix are mailed by U.S. Mail this August 24, 1994, to Attorneys Marcia Wagner and David J. Rohrbacher, Nicholson and Light, Attorneys for Defendant-Appellee Bob Schmidt Chevrolet, Inc., One SeaGate, Suite 170, Toledo, Ohio 43604-1555, and Attorneys Ray A. Farris and Dennis A. Lyle, Attorneys for Defendant-Appellee Hydra-Matic Division, and General Motors Corporation, One SeaGate, Seventeenth Floor, Toledo, Ohio 43603-2088.



John G. Rust
Petotioners' Attorney

He drove the car, the car was shaking so bad that he had to keep two hands tight on the steering wheel and this made him sweat because holding the steering wheel was so hard. Mr. Setola was keeping the gas pedal halfway to the floor, just to get the car to pull itself.

After Mr. Setola got downtown in Toledo, and was at his wife's fofice, Best Guides, Inc., in the Security Building, Mr. Setola called to Bob Schmidt Chevrolet, talked to Mike, a service manager, and also his boss, name not known, and told them how hard, as mentioned above, the brake pedal was to press, and that it wouldn't go down, and that Mr. Setola had to use the emergency brake and downshifting to slow, and to stop the car. Mr. Setola also told them about the tires smoking, the car vibrating, the humming noise and a metal squealing noise, while locking and having to press down more on the accelerator to give the car the gas

to get it to go; and when MR. Setola took his foot off the gas pedal, the car didn't seem like it wanted to roll; and the car was hard to steer. (End. of p. 16)

TELEPHONE CALL FROM MR. SETOLA TO SERVICE MANAGER, "MIKE", BEFORE DRIVING THE CORVETTE ON ANTHONY WAYNE TRAIL TO THE POINT OF COLLISION

JANUARY 30, 1986

Sometime about mid-morning on January 30, 1986, a Thursday, after Mr. Setola was downtown and he was at his wife's place of business, Best Guides, Inc., Mr. Setola telephoned to Bob Schmidt Chevrolet, talked to "Mike" a service Manager. In this conversation, Mr. Setola told Bob Schmidt Chevrolet that the brake pedal would not go down, the car was shaking, stalling out, that the wheels and brakes were locking, and that Mr. Setola had to apply the bas in order to make the car go, and in order to stop the car, that he had to use the downshifting, and to use the emergency brakes, and that the regular brakes were not working. The tires got hot

and were smoking and then after MR. Setola told him all about the problems he had been having, the above is not a complete list of all the problems which Mr. Setola told him, then the first service manager put his boss on and his boss told Mr. Setola that it was a $30,000.00 car, that he was not having any problems, that it was all in his head and to go ahead and to drive the car and to bring it out to Bob Schmidt Chevrolet. (End of p. 17)

After MR. Setola had told the Bob Schmidt people on January 30, 1986, in the morning, about all the problems, and the problems he had in driving the car from Five Point Road down to downtown Toledo, and the Bob Schmidt people had told him that it was all in his head, that the car was safe to drive, he then decided to drive, and would not have driven the car except for what the Bob Schmidt Chevrolet man said.

In deciding to drive, he relied upon

what the two Bob Schmidt Chevrolet people had told him when they were on the telephone with him, that it was safe to drive, and that he should drive the car, and that there were no problems with the car, that it would operate all right, that all the problems were just in Mr. Setola's head and he relied upon that, and thought it was safe for him to drive the Corvette to Bob Schmidt's as he had safely driven it to downtown Toledo.

As he drove on Huron Street, south of Monroe Street, he had to use the emergency brake to stop at Monroe Street, then he turned right onto Monroe Street, and then went onto the street leading to the Anthony Wayne Trail, Mr. Setola then turned to the south and was going onto the Anthony Wayne Trail. AFter he got ont he Anthony Wayne Trail, the way ahead was clear, he was going around to 45 to 50 miles per hour, somewhere along in there.

Then ahead, at the City Park inter-

section, he saw cars stopped, he then tried to apply the emergency brake, but the emergency brake would not work. HE tried to press down on the brake pedal, but it would not go down, he down shifted so as to slow the car as best he could, pedal frozen solid. HE continued to press on the pedal and then he heard a loud pop, like a shotgun went off. The next thing (End of p. 18) he knew was that he saw the car ahead of him, and did all he could to stop. When Mr. Setola was trying to slow and stop the Corvette after he saw the cars stopped ahead at City Park, he used the emergency brake and down shifted, and he would have been able to stop, if the Corvette had slowed like it had when Mr. Setola downshifted and used the emergency brake as he did in driving into and stopping in downtown Toledo, but the Corvette's braking system didn't brake and slow as it had before. If the Corvette had slowed as he approached City Park, and as

he used the emergency brake, like it had in driving into downtown Toledo, he would have been able to have stopped. By downshifting and the emergency brake I had slowed to 10 mph as impact.(F.F.S.)

After Mr. Setola's Corvette stopped, he noticed then next the brake pedal went all the way to the bottom of the floor, and that there were no brakes. MR. Setola then checked the lady and the man ahead of him, and saw there was nothing ufrther that Mr. Setola could then do. He went to a phone, called his wife, and then called the police, and made the police aware of the situation.

His wife, Cheryl, arrived just as the police got there, then the police officer got into the Corvette, tried the brakes, and the brakes went to the floor. This was seen by Mr. Setola. MR. Setola told the police officer that he has been unable to stop because the brakes failed on the Corvette. Then, a witness came up, who was Lisa Rhodes,

and she was trying to give a statement to the police officer, but he would not take it. The Witness Rhodes said that Mr. Setola was not speeding, and had driven like he was trying to stop, but was unable to do so.

The police officer then said the car had to be moved off the road and then the car was pushed off the Anthony Wayne Trail to the (End of p. 19) right, away from the River, and parked about thirty feet from the Anthony Wayne Trail. The Police officer came and asked if he was all right. Mr. Setola told him he was sick to his stomach, thought he was going to vomit, and Mr. Setola asked the police officer how the police officer could say it was a sure clear distance when the police officer was not there to see it, and the police officer said, "That's the way we do it."

Then Mr. Setola and his wife went to Mercy Hospital, waited in the emergency room for four and one-half hours, decided to

leave because they had an accident they were taking care of. They were not going to get to Mr. Setola that Mr. Setola and his wife went to their residence at Five Points Road, and Mr. Setola called who gave the telephone number of the Jerry Sybert, and Mr. Sybert had a flat bed tow and the car was then towed to Mr. Setola's residence at Five Points Road.

Mr. Setola had inspected the car after the collision, saw that the hood was jammed and locked down and saw that the car was in the same condition, whenever it had arrived at Mr. Setola's residence as it had been right after the collision. There was no way that anyone could open up the hood, because the hood was jammed.

The same day, the accident was reported to Mr. Setola's insurance company, the Celina Insurance Company, and Mr. Setola also told Mr. Travis Neely of the collision.

After the Celina Mutual Insurance Com-

pany had received report of the collision, then the car was towed over to the American Customs Garage on Alexis Road. MR. Setola then saw that the car was at the American Customs, and saw that it was in the same condition as at the collision, of January 30, 1986, as described here before. (End p. 20)
(P. 21)
The American Customs Garage is at 5036 Alexis Road, Sylvania, Ohio.

When MR. Setola had been pressing on the brake pedal and the so-called pop happened, he noticed that the brake pedal did go down, and the brake pedal went right to the floor, and there was no braking effect that he could notice. The car was still in motion at that time. (End of p. 21)

STATEMENT OF EVENTS FROM THE CORVETTE BEING AT AMERICAN CUSTOMS GARAGE, MOVED TO DAVE WHITE CHEVROLET AND TESTING ON THE BRAKE SYSTEM INOLVED WITH MINERAL OIL CONTAMINANT FOUND IN THE CORVETTE BRAKE SYSTEM

From the scene of the accident, I had the car towed, as is, to the Five Point Road near Maumee, where I was staying, by

one JErry Sybert. After the collision, the hood was so damaged, that one could not pull it up nor open the hood. The hood was not opened, later at the American customs, then, I was present, and a Mr. Clarence Werener, and a Mr. Larry Wilson, an engineer, were present and Mr. Wilson took some of the brake fluid out of the brake system. I know that the hood was in the same condition when finally the car was towed to the American Customs, in Toledo, Ohio, in the first part of February, 1986, as it had been immediately after the collision, and that the hood had not been raised. Likewise, I know that there was no change to occur in the appearance of the outside of the engine parts, from the time that the hood was first opened, at the American Customs, until the car was taken to the Dave White Chevrolet, and that likewise, then, there was brake work done at the Dave White Chevrolet, as reported by professional Engineer Lawrence Wilson, President, Product

Analysis and Structural Testing, Inc., as shown in his report No. 209586.

Before the brakes failed on the Corvette on the Anthony Wayne Trail at City Park on January 30th, 1986, my corvette was not worked on by any other garage or repair people, except the Bob Schmidt Chevrolet, Inc., from the time that I got in until of the aforesaid collision.

I checked on the Corvette at the American Customs, on Alexis Road, from time to time. AFter the hood had been opened, as described above, I was at American Customs another time, and Mr. Clarence Werener, the adjuster for the Celina Insurance Company, he asked me if I had authorized anyone from General Motors, or Bob Schmidt Chevrolet, or anybody else, to go through my car, or to take any fluid out, or to take out any of the papers in my car. I told him that I had not, and that the only person who was authorized, was the Celina Insurance Company,

and whoever they designated. MR. Werener told me that a man, who he knew to be a representative of General Motors, had gotten into my car, as Mr. Werener had seen him get into the car, and take out some brake fluid and some documents that were inside the car, particularly in the glove compartment. In the group of papers in the glove compartment, I had had some repair orders from Bob Schmidt Chevrolet, other than the ones listed on page 2 of the Affidavit of John Schaller, which is Exhibit B in Defendant Bob Schmidt's Motion for Summary Judgment. I have my copy of the repair order of December 9, 1985, No. 56397, which I had left at my mother's, and also the repair order dated January 23, 1986, because that was given to me after the collision of January 30, 1986, and I had not put it in my Corvette.

Mr. Clarence WErener had not told me about somebody taking the papers out of my car at American Customs, nor taking the

brake fluid out, until well over a year after the collision of January 30, 1986, and I did not know about that at the time we were all out at the Dave White Chevrolet, when Engineer Wilson, my attorney, Tony Georghetti, and a representative of the General Motors Company, were all there, as shown in the report which is attached to the Affidavit of Lawrence P. Wilson, filed in this case on July 1, 1991. At the American Customs shop on Alexis Road when the hood was first opened by the mechanics there, who had to open it by tools because it was jammed and locked shut from the collision, Mr. Setola was present. (End of p. 23) The hood was opened by the mechanic cutting the fiberglass hood so it would open. When the hood was opened up, I could see that there was slight, sticky, gooey, fluid, over different parts of the motor, and the caps were off of the master cylinder, each being roughly seven to twelve inches away from the cylinder.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Frank Setola, et al.,	*	Case No. 3:90CV7317
Plaintiffs,	*	Judge Nicholas J. Walinski
vs.	*	AFFIDAVIT OF FRANK F. SETOLA SUBMITTED
Bob Schmidt Chevrolet, Inc., et al.,	*	BY PLAINTIFFS IN OPPOSITION TO SUMMARY JUDGMENT MOTIONS
Defendants.	*	John G. Rust
	*	4628 Lewis Avenue
	*	Toledo, Ohio 43612
	*	(419) 476-0347
		O.S.CT. #0000098

* * * * * * * * * * * *

STATE OF OHIO)
) SS
COUNTY OF LUCAS)

Frank F. Setola, being first duly sworn, deposes and states as follows:

At the time at the American Customs shop on Alexis Road, Toledo, Ohio, when the hood of his Corvette, which had been in the collision of January 30, 1986, was first opened up, the mechanic had to cut the fi-

berglass, to get the hood up. PResent then, were MR. Larry Wilson, an Engineer, hired by the Celina Insurance Company, Clarence Werener, an adjuster for the Celina Insurance Company, and Mr. Setola, and also Mr. Tony Georghetti, Mr. Setola's then attorney. Once that the hood (End of p. 25) was up, one could see white gooey, fluid, all over the motor. The caps were blown off the master cylinder of the brake system, WERE APPROXIMATELY SEVEN TO TWELVE INCHES AWAY FROM THE CYLINDER. (Page 26)

AFFIDAVIT SIGNATURE PAGE

Have you read your foregoing Affidavit of 28 number of pages, including this page? x yes _____

Do you swear before me, a Notary Public, State of Ohio/Michigan that your statements, to the best of your recollection, are true? x yes _____.

(s) Frank F. Setola
Signature of Affiant

Sworn to before me and subscribed in my presence this 31st day of December, 1991.

(s) JOhn G. Rust
John G. Rust
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission has no expiration date

147.03 BC

FILED
1990 JUNE 22 PM 3:50
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Frank Setola and Cheryl Setola, P.O. BOX 3111 Pt. Pleasant, New Jersey 08742, Plaintiffs, v. Bob Schmidt Chevrolet, Inc. 1425 Reynolds Road Toledo, Ohio 43615, and Hydra-matic Division General Motors Corporation 1455 W. Alexis Road Toledo, Ohio 43612, and General Motors Corporation General Motors Bldg. Detroit, Michigan 48202, Defendants.	*	Case No. 3:90CV7317 Judge Nicholas J. Walinski COMPLAINT AND JURY DEMAND ENDORSED HEREON John G. Rust (0000098) 833 Security Building Toledo, Ohio 43604 (419) 243-9191 Attorney for Plaintiffs

1. Plaintiffs Frank Setola and Cheryl Setola, husband and wife, now residing and

domiciled in New Jersey. Defendants Bob Schmidt Chevrolet Inc.and Hydra-matic Division, General Motors Corporation, are duly organized and Active Corporations with their principal place of business in Ohio, and General Motors Corporation is duly organized and active and has its principal place of business in Michigan. Jurisdiction is claimed in this Court on Diversity of Citizenship of the parties, under Title 28, Section 1332. These causes of Action arose in this Division and District, in Toledo, Ohio. An Action on these causes of Action was timely commenced in the Court of Common Pleas, Lucas County, Ohio on January 29, 1988; service had and appearances by Defendants entered; was removed to this Court and then remanded back to the Court of Common Pleas, Lucas County, Ohio; and after proceedings in said Court, the said Actions were dismissed on June 22, 1989, not upon the merits nor with prejudice, but with the right given to refile

on or before June 22, 1990, as Plaintiffs now do.

2. Plaintiff Frank Setola on or about December 9, 1985, purchased a new Chevrolet Corvette from Bob Schmidt Chevrolet, Inc., and shortly afterwards the said Corvette presented brake problems, and the said Corvette was brought back to Bob Schmidt, Chevrolet, Inc., for repairs.

3. Due to the wrongful acts and omissions by Defendnats and each of them, Plaintiff Frank Setola was injured when on or about January 29, 1986, in Toledo, Lucas County, Ohio, the Corvette's brakes failed to function and caused the said Corvette to collide with another vehicle on the Anthony Wayne Trail.

4. Defendants Hyrda-Matic Division of General Motors, General Motors Corp. and Bob Schmidt Chevrolet, Inc., were each guilty of wrongful conduct, including negligence, and breach of contract, and breach of warranty, which proximately caused serious and perma-

nent injury to Plaintiff Frank Setola, and all the damages flowing therefrom.

5. The unlawful acts and omissions of each of the Defendants included, without exclusing other acts and omission, the following acts and omissions:

A. Failure to exercise ordinary care and diligence in taking all the steps necessary to have manufactured, and delivered, and serviced, the Corvette so that there would not occur the brake failures which did occur.

/and design

B. Failure to manufacture, and deliver a Corvette car which was safe and useful for the purposes for which it was sold and purchased;

C. Failure to instruct and inform Bob Schmidt Chevrolet, Inc., of the dangers in the Corvette in question, and how effectively to diagnose and repair said defects and problems;

D. Failure to inform and warn Plaintiffs of the dangers involved in the delivery of the said Corvette, at the times herein when it was dangerous so to do;

E. In failing to warn Bob Schmidt Chevrolet, Inc., and Plaintiffs of the dangers inherent in the said Corvette, in the various circumstances encoun-

ered and experienced;

F. In warranting and representing to Plaintiffs that said Corvette was safe and useful for the purposes sold.

6. Plaintiff Frank Setola was proximately caused by Defendants and each of them, serious head and brain injuries, which have been and in the future probably will be, disabling; pain and anxiety and concern about the extent of his recovery therefrom; to need and undergo medical and hospital care and expenses;

7. Defendants proximately caused Plaintiffs to suffer additional damages, including deprivations, interferences with their lives, other/ and loss of income, loss of use and depreciation in value; and repair bills.

8. Defendants proximately caused Plaintiff Cheryl Setola to suffer a loss of consortium, and her husband's services and to be concerned now and in the future, about his and her welfare.

WHEREFORE, Plaintiff Frank Setola, and Cheryl Setola, each, pray that each may have

and recover judgment against each Defendant, Bob Schmidt Chevrolet, Inc., and Hyrda-Matic Division of General Motors and General Motors Corp., for Five Hundred Thousand Dollars ($500,000), court costs, attorney fees and interest.

Respectfully submitted,

BY John G. Rust (s)
John G. Rust
Attorney for Plaintiffs
833 Security Building
Toledo, Ohio 43604
(419) 24309191

JURY DEMAND ENDORSED HEREON

Plaintiffs demand trial by jury of all the triable issues hereon.

John G. Rust (s)
John G. Rust
Attorney for Plaintiffs

FILED
91 JUL-8 PM 3:44
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Frank Setola, et al.,	*	CASE NO. 3:90CV7317
Plaintiffs,	*	JUDGE NICHOLAS J. WALINSKI
vs.	*	
Bob Schmidt Chevrolet, Inc., et al.,	*	AFFIDAVIT OF ERVIN LESHNER, P.E., SUBMITTED BY PLAINTIFFS IN OPPOSITION TO SUMMARY JUDGMENT MOTIONS.
Defendants.	*	
	*	John G. Rust 4628 Lewis Avenue
	*	Toledo, Ohio 43612 (419) 476-0347
	*	Attorney for Plaintiffs
	*	O.S.CT.#0000098

* * * * *

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit is served upon Counsel for the Defendants, Bob Schmidt Chevrolet, Inc., Attorney Marcia A. Wagner, One SeaGate, Suite 710, Toledo, Ohio 43604, and Attorney Ray A. Farris, for General Motors, Fuller & Henry, One SeaGate, Suite 1700, Toledo, Ohio 43603, by First Class U.S.

Mail this 8th day of July, 1991

John G. Rust (s)
John G. Rust, Attorney

ERVIN LESHNER, P.E.
REGISTERED PROFESSIONAL ENGINEER
131 CENTURA
CHERRY HILL, NEW JERSEY 08003
609-428-6125

Affidavit pertaining to:

Plaintiff, Frank F. Setola, Jr.

v.

General Motors, Bob Schmidt Chevrolet, Inc. et al

AFFIDAVIT OF ERVIN LESHNER, P.E.

July 1, 1991

Ervin Leshner, P.E. being first duly sworn, deposes and states that the statements of fact and opinion by him in this Affadavit are, to the best of his recollection true, and of his personal belief, and knowledge, except where stated otherwise.

1. Previously I have testified as an Expert Witness, in cases in the following courts:

Third Federal District Court, Philadelphia, PA

District Court, Barnstable, MA

District Court, Newark, NJ

District Court, Media, PA etc.

2. In regard to the issues presented to me for investigation and the statements made to me by Mr. Frank Setola, I have talked with him, read the report no. 209586 brake failure investigation, 1985 Corvette, for Celina Mutual Insurance Co., submitted by Mr. Lawrence F. Wilson P.E., President Product Analysis and Structural Testing Inc., and assuming the truth of what Mr. Wilson did nad observed, as stated in his said report, and assuming further, the truth of the Analytical Report", submitted by Mr. K.F. Sporek, dated May 5, 1986, ref.:209586 by the Contract Laboratories, Inc., Sylvania, Ohio, and so signed by Mr. K.F. Sporek; and assuming further, that in the brake system fluid,

as it was withdrawn by Mr. Lawrence F. Wilson, had the ingredients or contaminants, as so reported by the said Contract Laboratories, Associates, Inc.; and in assuming the history of the condition and what was done with the said 1985 Chevrolet Corvette, heretofore mentioned by Mr. Setola, it is my professional opinion, that to a reasonable degree of engineering and certainty, that, the said brake system fluid was so contaminated that it did cause the brake failure mentioned by Mr. Setola, which in turn caused Mr. Setola to be unable to stop said Corvette, and thereby the contaminated brake system fluid did proximately cause the said collision of January 30, 1986 and the injuries done therein; and,

3. Further, it is my opinion that contaminants in the brake system fluid of the said Setola 1985 CORVETTE were present and could not be detected on visual inspection because there was no requirement in the General Motors

specifications to color code brake fluids.

4. Further, it is my opinion that probably, not possibly, the said brake fluid was contaminated at the time the said Corvette was turned over to the Bob Schmidt Chevrolet in August 1985.

5. Further, it is my opinion that the contaminated fluid in the brake system of said Corvette could have possibly been added at the time Bob Schmidt Chevrolet serviced the vehicle prior to delivery to Mr. Setola.

6. Further, the said Corvette was defective, dangerous to be operated, because it that this contaminant in the brake system would cause a brake failure, as shown in the photographs and the discussion by Professional Engineer, Lawrence F. Wilson in his above mentioned report; and I have considered his photographs, his visual observations, the findings made and done by him personally, as stated in the said report in issuing these opinions.

7. The above statements are preliminary. Upon my full investigation, I plan to issue a report indicating and showing the negligence of General Motors and Bob Schmidt Chevrolet that caused the accident and injuries to Mr. Setola.

Ervin Leshner (s)
Ervin Leshner, P.E.

Sworn and Subscribed before
me this 2nd day of July, 1991

Janet Ferguson (s)

Janet G. Ferguson
Notary Public of New Jersey
My Commission expires June 24, 1993

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Frank Setola, et al.,	*	CASE NO.3:90CV7317
Plaintiffs,	*	JUDGE NICHOLAS J. WALINSKI
vs.	*	
Bob Schmidt Chevrolet, Inc., et al.,	*	AFFIDAVIT OF PETE DEWEES, SUBMITTED BY PLAINTIFFS IN OPPOSITION TO SUMMARY JUDGMENT MOTIONS.
Defendants.	*	
	*	John G. Rust 4628 Lewis Avenue Toledo, Ohio 43612 (419) 476-0347 Attorney for Plaintiffs O.S.CT# 0000098

* * * * * *

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit is served upon Counsel for the Defendants, Bob Schmidt Chevrolet, Inc., Attorney Ray A. Ferris, for General Motors, Fuller & Henry, One SeaGate, Suite 1700, Toledo, Ohio 43603, by First lass U.S. Mail fhis 8th day of June, 1991.

John G. Rust (S)
John G. Rust, Attorney

APP 110

STATE OF OHIO:
SS:
COUNTY OF LUCAS

Pete DeWees, being first duly sworn, deposes and states that his statements in this Affidavit, are true to the best of his recollection and knowledge:

Mr. R. Alright, thank you. I'm John Rust Attorney. I've got my new office at 4628 Lewis Avenue, 476-0347. I represent Mr. Frank Setola and his wife Cheryl in their claims arising out of the collision on the Anthony Wayne Trail at City Park back January the 30th, 1986. The papers that I have indicate that at the time, Frank alone was driving his car South, I call it South going to Maumee, maybe he was going 45, 50, something like that, comes up to a car that's stopped for a traffic light at City Park, goes to apply the brakes and he knows, he finds at that time that the brake pedal will not go down. He then is unable to stop the car, the car hits the rear end of the people, a lady is injured in that particular accident. The car then is moved over on City Park. Remember, there is a garage, more or less off to the Southwest of that intersection over there, and that's where it was. Then after that, the car is towed by Jerry Sybert, I think I've got the name right, out of Swanton out to where Frank lived around Maumee. In time then, it was towed to American Customs. Was there anything that places in your mind the time whenever it first came to American Customs?

*thing PD

Mr. D: About the only ~~think~~ that I remember is trying to move the car from where the tow truck operator dropped it

* The above asterisk and those hereafter refer to any longhand corrections by Mr. Dewees.

*outside PD
inside the building, and I noticed
~~that the~~ PD
there were brake pedal was as hard as a rock.

Mr. R: You did?

Mr. D: And at that time I decided not to start the car, and I think we pushed it into a stall.

Mr. R: I see. So then when you tried to depress the brake pedal, it would not go down.

Mr. D: That's correct.

Mr. R: Now then, do you recall anything about the condition of the fluid whenever it first got there, as to whether or not the hood, unless you used a crow bar it would come up, or something like that?

Mr. D: No, the hood was jammed and impossible to open without forcing it off the vehicle.

Mr. R: I see. OK, so at the start then, the hood remained closed in the same position in which your company received it for some time?

Mr. D: That is correct.

*PD
Mr. R: OK. So then ~~from~~, you put it inside your garage. What was your position then with that American Customs?
parts
Mr. D: I was the ~~fixxi~~ manager.

*Lea PD
Mr. R: Alright. Now Mr. Bart ~~Leigh~~, as I understood it called you the Service Manager.

Mr. D: Well, he was actually in charge of all the service work, I would write service repair orders estimates, handle parts for the vehicles, sell jobs to customers.

Mr. R: Yes, well previously have you ever worked as a mechanic?

Mr. D: No, I'm not a mechanic, I never have been.

Mr. R: But in your work before this time at American Customs, have you ever worked as a Service Writer or a Service Manager for any firm?

Mr. D: No, never in my life.

Mr. R: You didn't.

Mr. D: No sir.

Mr. R: Well, how did you acquire your familiarity with cars?

Mr. D: I have gasoline instead of blood in my veins.

Mr. R: Uh-huh. Alright. So you just got it through experience then?

Mr. D: Yes sir.

Mr. R: I follow you. Alright, then so the car was brought in. I realize that you and I have talked before on the telephone. I know one time you had something doing with your family when I was about; it seemed to me anyhow something came up or maybe you were going to be out of town, and so, I didn't get to come and see you at that time. What I remember is that

your remarks have been straightforward and in direct, the types of remarks that are perfect to a lawyer because they seem to be objective. And so you work with the public, I work with the public, you can understand what I'm saying to you by that. And so, what next then, stands in your mind in regard to the sequence of events relating to determining actually what it was, if anything which caused the brakes to do whatever they did in this particular collision and find out what potential causes were, or what investigation was done, what all you remember?

Mr. D: I remember we were trying to figure out why the brake pedal was so hard and looking at the brake reservoir I remember the fluid in it appeared unusually dark and I think we opened the top of the reservoir, saw the dark fluid, couldn't figure out what it was and I don't know who the party was, but someone called out a chemist or analyst to take a sample of the fluid, and I don't remember who the gentleman was.

Mr. R: Remember anything about what he looked like?

Mr. D: I wouldn't recognize him I don't think, if he was standing in front of me.

Mr. R: All right.

Mr. D: I don't know if the insurance company sent him out or Frank did.

Mr. R: Yeah.

Mr. D: We went ahead and repaired the damage to the vehicle with instruction not to touch anything with the brake system. And then I recall Frank having it towed to Dave White Chevrolet.

Mr. R: OK. Now when in that sequence of events did the ~~finish~~ hood get pried loose from where it was when it came to your place?

Mr. D: Umm.

Mr. R: Was anybody present at the time that it was marked that it not start to stay officially open? Or it was pried up? Do you remember anything like that?

Mr. D: Umm, this far back, I don't remember any, any longer. It's not uncommon on that kind of a vehicle when you get in a front end impact to jam the hood latch up against the, we call them dog pins.

Mr. R: Um-hmm.

Mr. D: And, that was not uncommon. The practice is still ~~isn't~~ not so uncommon. When they get jammed, there's only one way to open them up and that - to force the hood off, or cut the corners off - off the hood.

Mr. R: So you had to use force then to open this up. So then it would appear to you that after the collision happened, not nobody could have gotten inside to put anything in the brake cylinder up until the time that the car was received there at your place.

Mr. D: No, it was jammed, there was no human possible way to open that hood.

Mr. R: OK.

Mr. D: After the accident.

Mr. R: Now you saw the name of Mr. Clarence Werner in the papers that I just showed you. Do you remember him coming there?

Mr. D: To be honest with you, I don't.

Mr. R: You don't?

Mr. D: I recall Clarence but you're talking about something that happened 5 years ago or more.

Mr. R: Yeah.

Mr. D: I really don't remember.

Mr. R: Alright.

Mr. D: Exactly Clarence's handling the claim.

Mr. R: How, when you opened up the hood, you looked inside the, you call it the master cylinder?

Mr. D: Um-hmm.

Mr. R: What then was it that you saw, what was the significance of what you saw?

Mr. D: Well, brake fluid is a clear substance.

Mr. R: It is?

Mr. D: And the fluid that was in the reservoir, the reservoir itself, is semi-transparent. You can see into it without taking the lid off, and it was very dark in color or towards black. And that led us to believe something

must be wrong with the fluid that was in it. It's unusual for brake fluid to be black, to my knowledge.

Mr. R: OK. Do you recall that whenever the hood was raised that Frank Setola was there?

Mr. D: I don't recall him being there.

Mr. R: OK. Now then, after the hood was raised can you yourself remember any parts of the hood, whatever color it was being splotched on the motor block or on the parts that you see whenever you raise the hood and you look inside?

Mr. D: I don't recall seeing anything like that.

MR. R: I heard you. Alright, so then, do you remember then this chemist coming? Did he take any sample of this?

Mr. D: Yes, he took something out of, he took some of the fluid out of the reservoir, put it in a container. The last I ever saw of the man.

Mr. R: I follow you. It's been several years since I've seen the man, if he's the one that I'm thinking about now, Mr. Larry Wil-Wilson, he's about my build, maybe 5'7, my recollection is that he talks a bit with a West Virginia twang. Does that ring a bell with you.

Mr. D: Not to me, no.

Mr. R: Alright, so then after, stop just a minute, make sure we're getting it. Continuing on then, Mr. Bowers, then, at that point in time, can you

remember what lawyers use in term "theory" or explanations or potential explanations that Mr. Huler and you and the others were talking about in regard to what caused the brake pedal to be as hard as you found it to be?

Mr. D: Judging by the color we saw in the master cylinder reservoir, we anticipated it was a fluid other than brake fluid.

Mr. R: I follow you. That was in there?

Mr. D: Yeah.

Mr. R: Was there anything to indi-that would indicate how long that type of brake-I'm going to use the word "contaminant", osmething foreign to the regular, what you call the natural, clear fluid for brake fluid, as to how long it had been in there?

Mr. D: No, there's no way for me to guess, I have no knowledge of, chemical knowledge of what's ever the fluid turned out to be. I thought I - I think I remember some - I asked Bob if they ever found out what the results were and I thought someone came up and said "engine oil", but I don't know that for a fact.

Mr. R: I heard you there. Alright, so then, in time then, the car was - did Setola come in from time to time to your...

Mr. D: I believe to check on the vehicle, to see what our status was on the car, a lot of customers, it was common for

them to come and then look at the car under reconstruction.

Mr. R: Who were the people working there with you in American Customs then?

(secretary error should be Bart Lea)

Mr. D: Bob Schuller was the owner, and Bartlay was the Service Manager.

Mr. R: How do you spell his last name?

Mr. D: Schuller or Lay?

Mr. R: Lay.

Mr. D: Lea.

Mr. R: I've got you.

Mr. D: And Bart would have been responsible at that tike, back at that date to see that all of the mechanical items on a collision job were back to factory specification, and normally we would do most of the mechanical work before it would get to the body shop.

Mr. R: I follow you.

Mr. D: But I vividly remember having strict instructions to leave the brake system alone on the vehicle.

Mr. R: I understand you. And who were the people working under Bart Lea? OR under you?

Mr. D: O golly, yeah.

Mr. R: The mechanics.

Mr. D: Doug Brown was one of the mechanics at the time, I don't know if he worked

on the car, I can't recall, uh

Mr. R: Is he still with American Customs?

Mr. D: I think he is.

Mr. R: I've got you.

MR. D: And the body man most likely would have been a gentleman who still works here, his name is John Stoll - S-T-O-L-L. And most likely he would be the one that did the majority of the collision work, but not all of it.

Mr. R: Um-humm.

Mr. D: He may have done some of the body work on the vehicle, and we had several painters back then, and I couldn't tell you who painted the vehicle, at that particulat time. I do remember going out and examining the back end of the vehicle, cause Frank was curious about thinking that the back part of the vehicle had been spray-painted at one time, from Bob Schuller's and my examination of the rest of the car, somewhere during the life of that vehicle, the back end of that car has had paint work on it.

Mr. R: I follow you. It was different from the original?

MR. D: Yes, it was either done after it left the assembly line, and you know, at the assembly the plant or at the car dealership, or I couldn't tell you exactly where but a Corvette is painted in its entirety before it is assembled. And there is no overspray on anything because the parts aren't assembled on it.

Mr. R: I follow you.

Mr. D: And there was overspray I remember somewhere around the gas door opening and I believe possibly around the rear hatch rubber weather strips.

Mr. R: That's - so that be an indication the car had been in an accident before, a collision?

Mr. D: NOt necessarily.

MR. R: No?

MR. D: Not necessarily, just that it had had paint work. I don't recall seeing any signs that the vehicle had had Prior damage, just that it had had paint work.

Mr. R: Alright. Then, when the car then went to Dave White Chevrolet, when it went over there, did you or anybody from American Customs go along?

Mr. D: No, but I had remembered going down that day to pick up some parts at Dave White's, and I saw Frank, his attorney, someone from General Motors and one of the mechanics at Dave WHite Chevrolet examining the brake system, and I didn't get involved in the conversation, it was

Mr. R: OK. You said somebody from General MOtors was

Mr. D: I thought a factory rep or someone was there at that time or someone from their legal staff, uh, someone was there representing General Motors in one form or another.

Mr. R: I see. Did you recall how you got the information? Were you, do you

Mr. D: I was walking by, uh, I

Mr. R: ... the assembled group then?

Mr. D: They were in one of the service bays and I happened to walk through that and, area to get to their Parts Department and I had seen out of the corner of my eye Frank standing there and one of the mechanics and who the other gentlemen were, I think I just assumed that one of them appeared to be Frank's attorney and I was under the impression from the stories that I heard that someone from GM was there to examine and...

Mr. R: I follow you. Then you didn't stay around during when they examined the

Mr. D: No, it was none of my business.

Mr. R: I heard you. Then after that, what was the next thing that transpired in regard to the Corvette that you recall?

Mr. D: I heard something from Frank I thought that I can't remember if it was General Motors or his insurance company, I thought General Motors paid to have the entire brake system replaced. The master cylinder, the calipers, brake hoses, anything that could have been permeated by the contaminant, whatever it was.

Mr. R: Yes.

MR. D: And I hever heard what the contaminant was that I recall for certain.

Mr. R: OK. Well, now then, let me see here, then, the car was brought to your place in time?

Mr. D: I believe so. I think it was towed from our store down to Dave White's and I believe towed back.

Mr. R: Dave White's did brake work on it. Let me show you what, now I don't have these in necessarily correct order so it's kind of open so whatever you see in regard to that.

Mr. D: It was like what I was told, they replaced all the...Like some of these things have nothing to do with the brakes.

Mr. R: Uh-huh. Alright, now then, are you looking at one with this kind of writing on it?

Mr. D: All parts needed were not in stock.

Mt. T: Here's one that refers specifically to April 24th of '86.

Mr. D: These things are just like reading hieroglyphics.

Mr. R: Yes, they are.

Mr. D: 1-1-85. That would be before the accident.

Mr. R: That '85 is a mis..., I don't know how that got in there, frankly.

Mr. D: This here looks like the....look at all this writing in there. What date's this supposed to be?

Mr. R: Well, I'm looking here that's written about the brakes, says 4-24-86, it says "2 R spent on 4-21-86 to tear down and then put back together May the 9th, removed all 4 brake calipers and master cylinder completely disassembled, it looks to me like each item, great something lock was of all, was of all metal and wheel lines for. ..... looks like ..... or something.

Mr. D: the name is in the repair

Mr. R: It's 7-11-16 is Work Orders Order No. 7-11-614, got those and 7-11-07 is earlier.

Mr. D: 7-11-067 but I sure can't read the date on it. Where it says "date of sale, it's got a phone number. One of these I think is his car phone. What did they ever find was in the brake fluid?

Mr. R: On, well then, now that's

Mr. D: I'm just curious it's

Mr. R: Oh, now let me show you that because responsibility.

Mr. D: Bob was more involved with whatever was happening.

Mr. R: I follow you there.

Mr. D: Let's see the estimate.

Mr. R: I'm a coffee drinker so I spilled some coffee on that but there you are, that's one of the benefits.

Mr. D:

Mr. R: Tony Georgetti was the attorney for Setola at that time. He said he came there on February the 18th 19 6 so it wasn't there too long, then that car stayed where Frank first had it towed. They call it a hydro-carbon mineral oil, but what it is, I don't know... Glycol, does that mean anything?

Mr. D: Nothing to me. After that truck driver was getting ready to leave and I would start the vehicle and move it I would press on the brakes, it was just like stepping on the rock of Gibralter.

Mr. R: Um-humm.

Mr. D:

Mr. R: Well now then, I've seen you've got some your readings and comments here from this man who's a Larry F. Wilson. He's an engineer and he's got an engineering consulting firm. He used to be out by the old airport out around Walbridge, Ohio so that's where his office was when I first met him, but I've heard different conclusions drawn by different brake people. Now then, did you look at these photographs for the, these pictures of the

Mr. D: I remember the guy came out *PD taking pictures now, I just don't think I can remember, ~~I remember pulling the caps off and taking that picture~~ *PD I was standing behind him.

Mr. R: Oh, you mean the day out at Dave White's?

Mr. D: No, this was from, I thought, isn't that from American Customs?

Mr. R: Well that it may be, I'm not sure.

Mr. D: I think that's where he took those at cause there's still fluid in the reservoirs, so I thought according to that report, it said he drew it all out. See how dark that is?

Mr. R: Yes, It is.

Mr. D: Brake fluid's clear, just like, Oh, golly, there is a similarity

Mr. R: Like Johnson's baby oil?

Mr. D: Not quite that clear, similar. Power steering fluid does have the same consistency, a yellow cast to it.

Mr. R: Oh, it does?

Mr. D: Yeah, it's

Mr. R: Well, then this...

Mr. D: That fluid was dark, though, on the blackish or brownish side.

Mr. R: Alright, when you look at these, are you familiar enough with brakes to look at the calipers here, or anything to show, see whether or not this would indicate that there had been any brake problems and for what period of time?

Mr. D: I'd have to compare it with a new one, one that would be swollen would be contaminated because that's what happens with contaminants. They will cause the rubber seals to swell where brake fluid doesn't, it doesn't attack the rubber.

Mr. R: Alright, does these photograhs mean anything to you particularly?

Mr. D: No, to be honest with you, no.

Mr. R: OK. Alright, then after they were there then, was there any discussion between Bob Schuller and you concerning them, or anything like that?

Mr. D: No, it was, no, we were told to leave the brake system alone and

Mr. R: Yes.

Mr. D: And I think the only time we touched it was somebody was there to examine for what reason and we were instructed to do whatever we were instructed to do with it.

Mr. R: Alright, When the car came back then,

Mr. D: Back from Dave White's?

Mr. R: Yes, Could you press the brake pedal then? Do you remember anything about that?

Mr. D: No, I think, I don't remember why the vehicle was brought back, neither Frank, the insurance company hadn't paid us yet, I don't recall why it came back. Where there was something additional they wanted done, I thought the car was completed when they removed it from the premises.

Mr. R: Yeah.

Mr. D: I thought it was towed down to DAve White's and towed back, I don't honestly recall.

Mr. R: Alright. Was there any other evidences of any defects in the brakes?

Mr. D: Just that the pedal was unusually hard.

Mr. R: I follow you.

Mr. D: And that we could see the discoloration in the fluid.

Mr. R: OK. Alright. OK. Was there anything that indicated to you that the contamination that was in the master cylinder had gotten there before or while the car was in GM's hands and before it got to Bob Schmidt's hands?

Mr. D: No, there was no way to tell.

Mr. R: OK. Alright, just a minute. Let me get that on there. Alright, you're talking about a pin...

Mr. D: There's a pin on the hood of the Corvette, yeah there are latch plates on the cowel or the fire wall of the vehicle, and when the pins, when the hood's closed, those pins are down through this receiver, and on impact it will wedge those pins at an angle, and there's no way for the hood to come up without forcing it off.

Mr. R; I follow you.

Mr. D: So there,s no way that in my opinion that anyone could have opened that hood through any other manner other than - I think we cut the corners off that hood to remove it. It had to forcibly be ~~yeah~~, opened, there's no

way that that hood could have been opened after the accident except by force.

Mr. R: All right. Ok, there was no indication that it had had been opened?

Mr. D: None whatsoever.

Mr. R: Before it got to your place?

Mr. D: No, none.

Mr. R: Alright. Now then, OK, heree is a group of the papers from Bob Schmidt Chevrolet and now Setola says that they were telling him you've got rocks in your head, you're just talking about complaints with the brake system and he then said that the brake systems were not working. Is there anything in there that would indicate to you that the repair people should have found out about the contamin nts that were in the master cylinder that you saw, in other words, here, he got the car back from Bob Schmidt, I believe it's the day before this happened. He says that he even telephoned from downtown Toledo. See, his wife had some kind of a truck pricing business, you know where rates, stuff like that, and she was in the same building, the Security Building where I was at the time. And so that's what caused them, I think, to hire me, because there was some differences that developed between

(Inaudible - End of Side 1)
Beginning of Side 2 of Tape

Mr. D: OK.

Mr. R: You're looking now at the repair papers of Bob Schmidt Chevrolet. And would you say that cause a person in the - a repairman to look at the master cylinder at that time, to open it to check for

Mr. D: Well, I would think they would want to inspect everything to see why the rear brakes were locking up.

Mr. R: As a part of that inspection then in you, would think that they would have looked inside the brake, inside the brake cylinder, the master...

Mr. D: I would think so. The master cylinder.

Mr. D: I think it's a little more legible.

Mr. R: Oh, brother, think what a lawyer, what time do you got? We're going to try to confuse other people, you know like doctors, you know, you on handwriting

Mr. D: ... backing up

Mr. R: Frank Setola says that's even more than what's shown there.

Mr. D: I heard more or less as rumors that ~~all the blood in~~ these files disappeared from Bob Schmidt after they requested them.

Mr. R: Yeah.

Mr. D: They couldn't find them

Rear wheel, and left rear wheel, and wheel seems to lock up sometimes. At times.

Mr. R: What's the date on that one?

Mr. D: Uh, I think that's a continuation of yeah,

Mr. R: December the 19th?

Mr. D: I think so. Was this a brand new vehicle when he bought this at...

Mr. R: It was. He bought it as a new car,

Mr. D: Not in trade or something?

Mr. R: I think that they could, let's but it must have been something like that so that if you check, he bought it in December of 1985. By that time, then your '86's are your new car.

Mr. D: . . .

Mr. R: How that all fit in that way, I'm not really sure.

Mr. D: Well back on December 19th, of 85, you have 32...it revolves on.

Mr. R: Not many.

Mr. D: Remove dime jammed in, can't, I can't ...sure that it remove dime jammed in something and then customer has large pile of cat litter under driver's seat.

Mr. R: Yeah.

Mr. D: I remember something about when that car came in there, there was a bunch of cat litter in it, we couldn't figure out why. I think it was this vehicle. I thought it was strange that there was a pile of cat litter in the car.

Mr. R: Yeah.

Mr. D: . . . Boy, this/sure seems strange the way that these are written, I'm not familiar with the way they do business out at Bob Schmidt's. I don't understand the way these are hand'written, and they aren't anything like these. Is that a common practice for them to have the additional?

Mr. R: I'm not sure about that.

Mr. D: I'm surprised /he bought the car after reading all these complaints that he had about it, most of them are when he first bought it.

Mr. R: Well, now he bought it Dec ember the 5th

Mr. D: . . . I can't understand this, it says something about filling a reservoir but I don't know what reservoir.

Mr. R: Somebody indicated that could have been the

Mr. D: Coolant?

Mr. R: Power steering or something like that.

Mr. D: Well I see that's something in here about the radiator had a coolant leak, it's possible it could have been the coolant reservoir. Check and fill reservoir. What reservoir?

Mr. R: Yeah.

Mr. D: I'm trying to play detective.

Mr. R: Well that's OK. But you had said that at least on this December the 19th,

repair order or work order, whatever you call that, that then you would think their mechanics following the standard of practice of like good, competent mechanics follow would have inspected the brake cylinder and would have seen then, whatever was to be seen inside of it then.

Mr. D: I would have thought so, I mean, if somebody complained to me about brakes locking out, not only would I first drive the car and both wheels to inspect I would, I would think one of the first things you'd look at would be the master cylinder just to see if it's high, low or

Mr. R: Um-hmm.

Mr. D: Whatever.

Mr. R: Alright. But so outside of that you didn't notice anything particularly unusual that's shown inthe work orders of ... Bob Schmidt?

Mr. D: Yeah, some of the way the work orders are handwritten. I ~~wasn't~~ would like sure - like to look at some of their other ones involving other vehicles just to see if it'd have the same consistency.

Mr. R: I follow you. Alright. OK.

Mr. D: ...involved in requesting those files, could you . . .

Mr. R: Well, that - I've got, now I'm going to have to recheck with Frank to make sure the particular days that he says it was there, but he says it was there

more often than this, and one time he said he drove to New Jersey, he had a, had brake problems, came up to a stop sign, he could not stop, had an accident. He then had the car towed all the way back to New Jersey to Maumee. It cost him around $400.00 but he said that the Chevrolet dealers out there didn't want to touch the car.

Mr. D: A Corvette is a strange animal. Most of the customers, Corvette owned are very fussy, very picky and most repair businesses don't want them for customers. Cause they're nit-pickers.

Mr. R: Oh, I follow you. Yeah.

Mr. D: And we specially cater to that.

Mr. R: I follow you

Mr. D: Um-hmm. And we got paid for it.

Mr. R: Um-hmm. Alright. Now do you think that you'll be home, do you get home any regular time or anything like

Mr. D: No, no, I'm a manager and I've got dinner meetings sometimes,...meetings,

Mr. R: Well, then when I get this typed I should just give you a call.

Mr. D: Yeah.

AFFIDAVIT SIGNATURE PAGE

Have you read your foregoing Affidavit of 15 number of pages, including this page? yes
yes

Do you swear before me, a Notary Public, State of Ohio that your statements, to the best of your recolleciton, are true? yes
yes
_____.

Pete DeWees (s)
Signature of Affiant

Sworn to before me and subscribed in my presence this 5th day of July, 1991, 1988.91

John G. Rust (s)

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Frank Setola, et al.,	*	Case No. 3:90CV7317
Plaintiffs,	*	Judge Nicholas J. Walinski
vs.	*	AFFIDAVIT OF ALAN J. KAROLY
Bob Schmidt Chevrolet, Inc., et al.,	*	John G. Rust (0000098)
Defendants.	*	4628 Lewis Avenue Toledo, Ohio 43612 (419) 476-0347 Attorney for Plaintiffs

* * * * * * *

STATE OF OHIO)
) SS
COUNTY OF LUCAS)

Alan J. Karoly being first duly sworn, deposes and states as follows:

I graduated from Macomber High School, where I had mechanical training; and after that, I have worked as an automobile mechanic at George Ballas Buick Co.; and as a mechanic also at the Commercial ~~Car~~ tire Co., Toledo, Ohio;

also at King Radiator. I worked at George Ballas as a mechanic for about 2 1/2 years; I started in my own business in 1986, and have continued and run that business successfully under the name of AJ Towing and Automotive, 653 Millard Avenue, Oregon, Ohio. I became a certified mechanic by taking a test and have a certification in automotive and truck; and I have passed their test in all seven categories, and am classified as a Master Automotive and Master Truck Repairman.

I have reviewed the Affidavit of Mr. Frank F. Setola of 28 number of pages. And, accepting what he has said therein, as to what he did and found, as true, it is my opinion as a Certified Master Mechanic that the brakes did fail on the Corvette, which he was driving, in the collosion of January 30, 1986, on the Anthony Wayne Trail, at its intersection with City Park, Toledo, Ohio. The statements by Mr. Setola as to the performance of the Corvette, the performance, complaints

and problems about the brake system of the Corvette, what he experienced, are credible, reasonable and consistent with what I have learned about brake systems, including the brake system of the Corvette. I have worked on the Corvettes and their brake systems.

What I have learned about brakes, is consistent, with Mr. Setola's statements, that as he was driving the car, pushed down on the brake pedal, and it would not go down, but at the end, just before the impact, it did go down, when there was a pop, and afterwards that the brake pedal went all the way to the floor, and that there then no brakes, and these statements are consistent with what I have learned about brakes. In other words, when the brake pedal did go all the way to the floor, that showed that there were no brakes then. I have noted also the statements, that the Corvette was towed then to the residence of Mr. Setola at 5 Points Roads, and then towed to the American Customs, a recognized garage

considered to be expert in Corvettes. I have also been advised, and accept as true herein, the statements by Mr. Pete DeWees, American Customs, that whenever the Corvette in question of Mr. Setola was received at the American Customs, that then Mr. DeWees checked the brakes, found that there were no brakes; and that later, the hood was opened by the mechanics at American Customs cutting the fiberglass hood, and at that time, it was seen by Mr. Setola, white, sticky, gooey fluid, which made spots on top of the engine parts, inside the hood.

I have inspected the work orders of the Bob Schmidt Chevrolet, Company, as shown on page B-2of the Affidavit of Mr. John Schaller, in Bob Schmidt's Motion for Summary Judgment. In viewing repair order 56862 of December 19, 1985, which shows "Rear Brake Lock-up. Rear Axle LKS." And also the repair order number 57828 of January 23, 1986, which shows on page 2 of 3 "CK for Rear Axle LK at LR wheel and

wheel seems to lock up times," and accepting also that Mr. Setola stated to the Bob Schmidt Service Manager, or repair order writer, as he states in his Affidavit that then it was evidenc that Mr. Metcla was experiencing a hard brake pedal, which would interfere with effective braking action by the brakes, and then the service manager should have informed the mechanics that there was a history of brake problems, and the car should have been looked at, until the cause of the problem was found, and the failure by Bob Schmidt to do this, in my opinion, was not professional, negligent, and in so doing, it's my opinion that Bob Schmidt failed to follow the standard of care and practice that is ordinarily followed by car dealers of like kind and quality under the same or similar circumstances.

In my opinion, the braking system on Mr. Setola's Corvette, which had gotten real hot, according to Mr. Setola, when he had dri-

ven it from South of Perrysburg into down-town Toledo, on Huron Street, so that the wheels were smoking, and then he drives the car from there south to Monroe, west on Monroe to Michigan and South on Michigan to the Anthony Wayne Trail, that this added heat that was being generated on the brakes, in there then conditon, would cause, in my opinion, the brakes not to be as effective when the car was on the Anthony Wayne Trail, as the brakes overall had been whenever Mr. Setola states that he brought the car to a stop on Huron near Madison

My statements of opinion herein, are each one made of what I believe to have been probable under what I have learned from the established principles about brakes, what causes them to function, and what causes them not to function; and I have worked before on the Corvettes and their braking systems.

Accepting Mr. Setola's Affidavit that he received the car back, that is the Corvette,

on January 29, 1986, and that and accepting also the report of Engineer Wilson of the Product Analysis and Structural Testing Company, that the car was inspected by Mr. Wilson, on February 18, 1986, there is a span of time there of 20 days. Considering that and also the fact that Mr. Pete DeWees of American Customs Industry, Inc., stated that there were no brakes on the car, when it was towed into American Customs, it is my opinion, since there was a demonstrated brake problem, when he had the collision on January 30, 1986, that there was also a brake problem on the car, when it left the Bob Schmidt Chevrolet on Friady, January 29, 1986. It is further my opinion, that when Mr. Setola called in the morning of January 30, 1986, reported the problems that he was having on the brakes, that the brake pedal would not go down, that there was smoke around the tires, and that the wheels were not turning smoothly. Then the Bob Schmidt Chevrolet representative

should have advised him to have not driven the car, but to have it towed out to Bob Schmidt, and the failure, accepting Mr. Setola's statements, on the part of Bob Schmidt, to so have warned and cautioned him, and instead, according to Mr. Setola, of having Mr. Setola the car was okay to drive, was negligent, and were acts which showed that the representative in question of the Bob Schmidt Chevrolet Company, were not following the standard of care and dilligence of ordinarily careful and prudent persons in the automobile business, like the representatives of Bob Schmidt and the Bob Schmidt Chevrolet Company. In other words, Bob Schmidt's representative should have told Mr. Setola not to drive the car because it was apparent receiving the complaints that Mr. Setola states that he advised the Bob Schmidt Company of, that the brakes would not operate and it would be obvious then that the car was in an unsafe condition to drive,

and Bob Schmidt should have so advised Mr. Setola.

I knwo that power steering fluid has a hydrocarbon oil, and Bob Schmidt's repair order #57828, 1/23/86, shows that power steering fluid was added by Bob Schmidt Chevrolet.

MEETING OF JGR AND MR. KAROLY

MR. RUST: Mr. Karoly, please turn there to the section of the report of Mr. Larry Wilson of the Product Analysis Company where there was finding to the distortion of one of the calibers.

MR. KAROLY: Well,...

R: Read off the page number to which you are referring in the particular findings.

K: They say on page 2 on the bottom left front and left rear are contaminated with mineral oil.

R: Alright.

K: Apparently, they didn't do any tests. I'm comparing wheel ~~cylinder~~ *caliper sealed, ~~unaudible~~ *cups, the new parts like they did with the master tops.

R: What about the parts that are shown here?

* Handwritten changes by Mr. Karoly.

K: They are all parts removed from the vehicle as far as I can understand.

R: What do these four...say right wheel caliber per cup, and S and seal. Left ~~rear~~ rear caliber, cylinder cup seal. What do these four and others for left front andright front. What do those four photographs show to you?

K: From what I can see from them pictures, it looks like the left rear more than the other three. The cup has swelling some to it.

R: Yes.

K: The seal looks like it could be a little bit larger, but it's hard to tell from a picture.

r: OK.

K: That's the cause of mineral oil coming incontact with them brake parts.

R: What do the conditions shown in those four photographs, in your opinion probably cause in the braking action, how do those conditions affect the braking action of the Corvette in question?

K: When the seals Swell up, contamination, that will cause a wheel to lock up.

R: Which are you talking about.

K: That's a caliber seal. That will cause a wheel lock up or to have a brake that's dragging all of the time.

R: OK. Read off the section of Mr. Wilson's opinion with which you disagree, and state why.

K: Page 4, their conclusion on the last section there, it was impossible however to prove that this had any affect on the braking action of the vehicle. I disagree with that. I feel that because of the parts being swollen up caused a great deal of affect on the braking system.

R: Mr. Karoly, would then read out the parts of the findings of the report of the Engineer Larry Wilson that report number 209586, Brake Failure Investigation, 1985 Corvette for Celina Insurance Company. REad out the parts there of the findings that you feel are significant and wherein you in your opinion disagree with Engineer Wilson.

K: Well, just going back to page 2 with the testing of left front left rear the fluid came out of the two calibers there, both of them ad mineral oil in them, so they are both contaminated and basically the part that I disagree with is it was impossible however to prove that this had any affect on the braking action to the vehicle.

R: That's on page what?

K: Page 4.....last line.....I feel that that would have an affect on the braking system, because....

R: What would?

K: The contamination of the wheel ~~cylinder~~ caliber's for the calibers and master cylinder.

R: Would each have an affect on the braking action?

K: Yes, it would.

R: What would be the adverse or loss of braking action in each of those conditions, either taken singularly or together, would cause?

K: Well, all of them together would cause brake failure, or loss of brakes. The calibers having contaminated fluid in them, would cause wheels to lock up, brakes to drag. The contamination in the master cylinder would cause a hard brake pedal and all of them together would cause a loss of brakes.

R: Alright.....Now then, what was it, in your opinion then, accepting Mr. Setola's statement, that there was a pop, just before the impact, what do you think that pop-showed was happening within the automobile, and what caused that to happen?

K: Well, as the report shows that when they opened the hood on the vehicle for the first time, the tops were off the master cylinder I would have to say that the pop came from the two tops coming off the reservoirs, and the cause of that would be a tremendous amount of pressure influcted upon the master cylinder before the accident. Probably without looking at the parts, one of the cups, or the cup that's inside the master cylinder finally gave out to let the fluid get past and come back up into the reservoir. Because the pressure builds up in the reservoir, and that's what popped the tops off.

R: Alright. When the pop occurred and the cups of the master cylinders blew off, what affect did that have on the brake pedal as to how far it would be pressed.

K: It's very possible that the pedal would go to the floor, then.

R: Alright, you're saying very possible. You mean probable...

K: Very probable.

R: Alright...All of your statements here today are based upon what you would call reasonable mechanic certainty and supported by sound principles of auto mechanics.

K: Yeah.

R: Alright.

All the statements and opinions herein stated are made in keeping with reasonable mechanical certainty and probability, and are supported by sound auto-mechanical practice and learning and experience.

In this Affidavit, the affiant is using the word negligence as the failure of a person to do what a person of ordinary and reasonable care, diligence and prudence would do under the same or similar circumstances, and the word negligence is limited further to what a competent service manager, repair or service order writer, or mechanic, in a garage like Bob Schmidt Chevrolet, Inc. of Toledo, Ohio would do, and an act is termed negligent when the actor is guilty of negligence.

AFFIDAVIT SIGNATURE PAGE

Have you read your foregoing Affidavit of 12 number of pages, including this page? yes

Do you swear before me, a Notary Public, State of Ohio/Michigan that your statements, to the best of your recollection, are true? yes.

Alan J. Karoly (s)
Signature of Affiant

Sworn to before me and subscribed in my presence this 6th day of January, 1992.

John G. Rust (s)

CERTIFICATE OF SERVICE

A copy of the foregoing Affidavit is served upon Counsel for the Defendants, Bob Schmidt Chevrolet, Inc., Attorney Marcia A. Wagner, One SeaGate, Suite 710, Toledo, Ohio 43604, and Attorney Ray A. Farris, for General Motors, Fuller & Henry, One SeaGate, Suite 1700, Toledo, Ohio 43603, by First Class U.S. Mail this 7th day of January, 1992.

John G. Rust

(4)
Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

No. 94-440

In The

Supreme Court of the United States

October Term, 1994

FRANK SETOLA, *et al.*,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL MOTORS CORPORATION

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QUESTIONS PRESENTED

As viewed by respondent General Motors Corporation, including Hydramatic, a division of General Motors Corporation, the instant petition presents the following questions:

1. Whether either the district court or the court of appeals was required to presume that there was a "genuine issue as to any material fact" that precluded summary judgment.

2. Whether after the district court has correctly entered summary judgment in favor of a defendant and has then correctly denied the plaintiffs' motion for reconsideration and also after the court of appeals has correctly affirmed that judgment and has then correctly refused the filing of an untimely petition for rehearing *en banc*, there is any need for further review by this Court.

3. Whether after both the district court and the court of appeals have fully examined and considered plaintiffs' asserted claim against a defendant and have rendered correct decisions adverse to plaintiffs, this Court should be persuaded either by unsupported and unsupportable arguments or by meaningless arguments to permit further review and thereby unnecessarily to burden further its docket.

PARTIES TO THE PROCEEDING

The petition does not have a statement as to parties. The names of the parties appearing in the petition's caption are only partially correct.

The petitioners, plaintiffs in the district court, are Frank and Cheryl Setola, husband and wife, former Ohio residents who now reside in New Jersey.

There are two respondents, defendants in the district court. The first respondent is Bob Schmidt Chevrolet, Inc., an Ohio corporation. The second respondent is General Motors Corporation, a Michigan corporation. The petition incorrectly names Hydramatic as a separate respondent, but Hydramatic is a division of General Motors Corporation, and Hydramatic is not a separate entity.

Except where the context otherwise requires, petitioners will be referred to as "plaintiffs"; respondent Bob Schmidt Chevrolet, Inc. will be referred to as either "defendant Schmidt" or "Schmidt"; and General Motors Corporation will be referred to as either "defendant General Motors" or "General Motors."

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OPINIONS BELOW

The plaintiffs' Appendix does not include all of the appropriate decisions of the United States District Court for the Northern District of Ohio, Western Division. As to defendant General Motors, the order journalizing admissions and the summary judgment opinion of the district court should be included; they have not been reported, and they are printed and attached hereto as Opposition Appendix A, at 1a, and Opposition Appendix B, at 4a, respectively. Other decisions by the district court have also not been reported, and they are Appendix 3, 4, and 5 to the petition. The memorandum opinion of the United States Court of Appeals for the Sixth Circuit has not been reported, is not recommended for publication, and is Appendix 1 to the petition. The Sixth Circuit's affirmance of the district court's decision is noted under "Decisions Without Published Opinions" at 27 F.3d 567 (6th Cir. 1994). The Sixth Circuit's order that the untimely petition for rehearing *en banc* not be accepted for filing has not been reported and is Appendix 2 to the petition.

STATEMENT OF THE CASE

A. Introduction

This instant action arises from a 1986 rear-ender motor vehicle accident case.

Plaintiffs originally filed their complaint in the Court of Common Pleas, Lucas County, Ohio, and later dismissed and refiled in the district court on diversity grounds. In the instant action, Frank and Cheryl Setola, husband and wife, filed a negligence action against the car dealership, defendant Schmidt. This claim was based on the averment that an employee of defendant Schmidt instructed Mr. Setola to operate the vehicle at a time when the dealership should have known that the brake system was defective. In addition, a separate products liability claim was

averred against the car manufacturer, defendant General Motors. This collateral claim was based on an averment that the vehicle brake system was defective because it contained a contaminant that caused the brake system to fail.

As detailed in the chronological history of filings, the only circumstances pertinent to plaintiffs' petition against defendant General Motors concern whether the district court's journalization of deemed admissions, subsequent grant of summary judgment based thereon, and denial of plaintiffs' belated motion to withdraw the deemed admissions was an abuse of discretion. More specifically, the issue is whether the district court abused its discretion in denying plaintiffs' motion to withdraw the journalized deemed admissions which was filed approximately seven months *after* the district court had entered summary judgment on behalf of defendant General Motors.

Yet, plaintiffs' statement of the facts and presentation of questions for review are filled with recitations of affidavit testimony and other irrelevancies that have no relationship whatsoever to the journalized deemed admissions thus resulting in discussions in the petition that are not germane to General Motors. In addition, when attempting to decipher out the circumstances applicable to General Motors, one also becomes aware that plaintiffs' petition is replete with inaccuracies and misstatements.

In order to place the questions presented for review in proper perspective, it is necessary to review some facts and some related proceedings below from many years ago. Unfortunately, since plaintiffs' supposed statement of the case in their petition is only partially complete, at best, this statement, for this additional reason, is longer than would normally be preferred. For the convenience of the Court, the facts and the related proceedings below covering this lengthy time span will generally be summarized in their approximate chronological order.

B. Accident History

On December 3, 1985, Mr. Setola purchased a 1985 Corvette from Schmidt. On January 30, 1986, Mr. Setola, while operating his Corvette, was involved in a motor vehicle accident in Toledo, Ohio. At that time, he hit the rear end of another vehicle, which was stopped at an intersection.

At the time of the accident, Mr. Setola had already put 7,194 miles on his Corvette in a little over a month of ownership. During this time of ownership, Mr. Setola's vehicle was never serviced or examined by anyone from General Motors. Throughout this litigation, and as demonstrated below, plaintiffs' basic contention has been that the Corvette's brakes were defective when Schmidt returned the Corvette to Mr. Setola on January 29, 1986, not at the time it left General Motors' hands in August, 1985.

C. Proceedings Below

On January 20, 1988, plaintiffs filed their complaint against defendants Schmidt and General Motors in the Court of Common Pleas, Lucas County, Ohio. On June 22, 1989, the state action was dismissed by plaintiffs with a right to refile. On June 22, 1990, plaintiffs, having moved to New Jersey, refiled their action in the United States District Court for the Northern District of Ohio, Western Division, and asserted jurisdiction on diversity grounds. Answers were then filed.

On October 12, 1990, the district court issued its pretrial order delineating the litigation management schedule, which included a discovery deadline of June 9, 1991, and a trial date of September 9, 1991. On November 14, 1990, General Motors served its discovery and requests for admission on plaintiffs. Contrary to plaintiffs' reference to General Motors' discovery as "voluminous" (Petition, at iv), that discovery and those requests for admissions were limited to questions primarily pertaining to the basis of plaintiffs' product defect allegations.

That discovery and those requests for admissions, which were designed to narrow the issues regarding the alleged product defect, specifically asked plaintiffs to admit that the vehicle in question was not defective in manufacture or design. In addition, the fourth request for admission asked plaintiffs to admit that Frank Setola's own careless conduct was the cause of the January 30, 1986, accident. These requests for admissions are the core of plaintiffs' appeal as to General Motors. As the district court stated, it is those admissions which "cut at the heart of plaintiffs' claims and allowed General Motors to succeed on its motion for summary judgment." Appendix, at 41, August 4, 1992, Memorandum and Order.

Those four requests for admissions are as follows:

> REQUEST FOR ADMISSION NO. 1: Please admit there was and is no privity of contract between plaintiffs and General Motors Corporation in respect of this 1985 Corvette.
>
> REQUEST FOR ADMISSION NO. 2: Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant G.M.
>
> REQUEST FOR ADMISSION NO. 3: Please admit that this 1985 Chevrolet Corvette was not defectively manufactured by defendant G.M.
>
> REQUEST FOR ADMISSION NO. 4: Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.

Opposition Appendix B, at 7a-8a, November 4, 1991, Memorandum and Order. Four months passed after service of this discovery and requests for admissions. Plaintiffs did nothing!

On March 18, 1991, and with no action of any type by plaintiffs, General Motors filed a motion to journalize the

admissions. Plaintiffs still did not serve their responses, nor did they ask for leave to do so. Contrary to plaintiffs' assertion at page 9 of the petition, plaintiffs did not request an extension of time to answer the discovery or the four requests for admissions. Instead, plaintiffs' only response was thereafter to request an extension of time to oppose this defendant's motion to journalize the admissions.

On April 10, 1991, the district court entered its order and stated:

> In the case *sub judice,* defendants submit that plaintiffs have failed to respond to the requests served upon them. Plaintiffs seek an extension of time until April 17, 1991 to respond to defendants' motion. Plaintiffs had until December 17, 1990 to respond to the requests or in the alternative seek an extension of time as to the requests. Plaintiffs did neither. As they failed to respond in a timely fashion the Court finds defendants' motion well taken and the requests are deemed admitted.

Opposition Appendix A, at 3a, April 10, 1991, Memorandum and Order. Despite the binding effect of the district court's order and its significant impact, plaintiffs still did nothing. An additional two months passed.

On June 12, 1991, defendant General Motors moved for summary judgment. That motion and short memorandum in support were based upon the district court's journalization of the deemed admissions; specifically, that the 1985 Corvette was not either defectively designed or defectively manufactured by General Motors, and that plaintiff Frank Setola's failure to maintain an assured clear distance ahead caused the accident in question.

Plaintiffs continued to do nothing with respect either to the district court's order of April 10, 1991, or to defendant General

Motors' motion for summary judgment of June 12, 1991. It was only after doing nothing, following the district court's order of April 10, 1991, and defendant General Motors' June 12, 1991, motion for summary judgment, that plaintiffs on June 17, 1991, moved to vacate the September 9, 1991, trial date.

On July 1, 1991, plaintiffs filed their opposition to defendant General Motors' summary judgment motion. Their opposition consisted primarily of inadmissible affidavits which were, in large part, unrelated to the claim against General Motors. Further, plaintiffs did not submit any affidavits in attempting to justify the unexcused delays in answering the discovery and the four requests for admission. On July 31, 1991, General Motors filed a reply memorandum and a motion to strike the affidavits attached to plaintiffs' opposition. In its reply brief, General Motors noted that Lawrence F. Wilson, plaintiffs' investigator and purported expert, stated that it was "impossible" to render an opinion as to the product defect in the vehicle. Appendix, at 33, October 14, 1992, Memorandum and Order.

On November 4, 1991, the district court entered its order granting General Motors' motion for summary judgment and stated:

> Plaintiffs attempt to overcome the admissions through a series of affidavits which defendants have moved to have stricken for noncompliance with the Fed.R.Civ.P. 56(e). The Court notes that the admissions were served upon plaintiffs on November 13, 1990. It was not until April 5, 1991, almost five months later, that plaintiffs moved for an extension of time to respond to the admissions. (sic) Thereafter, on April 10, 1991, the Court granted defendants' motion to admit the admissions.
>
> . . .
>
> Once such matters are admitted, summary judgment can be granted on the basis of the admissions.

> (Citations omitted.) Default admissions cannot later be attacked on the basis of affidavits contained within an opposition to summary judgment. *O'Bryant v. Allstate Ins. Co.*, 107 F.R.D. 45 (D. Conn. 1985).
>
> While the effect of the above admissions is clear, to allow plaintiffs at this juncture to attack the issues contained in the admissions is to disregard the letter of the law and reward plaintiffs for their inaction. Accordingly, the Court finds that the admissions are properly applied to the motion for summary judgment. There exists no genuine issue of material fact and as a matter of law, General Motors is entitled to summary judgment on all claims.

Opposition Appendix B, at 9a-10a, November 4, 1991, Memorandum and Order.

On December 6, 1991, which was after defendant General Motors' involvement in this action had been completely adjudicated and terminated by the district court, defendant Schmidt filed its motion for summary judgment. On January 7, 1992, plaintiffs filed their opposition, including a variety of incompetent and inadmissible affidavits, to defendant Schmidt's motion for summary judgment.

On June 17, 1992, approximately 12 months after General Motors had filed its motion for summary judgment and approximately seven months after the district court had entered summary judgment in favor of defendant General Motors, plaintiffs filed a Rule 36(b) motion to withdraw admissions and vacate the summary judgment in favor of General Motors. On July 7, 1992, General Motors filed its brief in opposition.

On August 4, 1992, the district court, upon consideration of the arguments, denied plaintiffs' motion to withdraw the admissions and to vacate the summary judgment. In denying plaintiffs' motion, the district court stated:

> The purpose of admissions is to facilitate proof and narrow the issues. Fed. R. Civ. P. 36 advisory committee's note. The Court recognizes the importance of resolving the action on the merits but in this case finds that the reliance of GM upon the deemed admissions, plaintiffs' dilatory actions, and the purpose of admissions would be severely undermined were the Court to allow withdrawal at this late date.

Appendix, at 42-43, August 4, 1992, Memorandum and Order.

Unwilling to face reality, plaintiffs repeatedly filed additional motions asking the district court to reconsider their earlier arguments. Two months later, on October 14, 1992, the district court denied plaintiffs' additional motions and entered summary judgment on behalf of defendant Schmidt. Appendix, at 14.

Thereafter, plaintiffs filed yet another redundant motion. On October 30, 1992, plaintiffs served their motion to amend or alter the judgment as to both defendants. The defendants separately responded, but each emphasized that plaintiffs' arguments were duplicative of prior arguments. On January 26, 1993, Judge Dowd, then sitting for the deceased Judge Walinski, considered these matters and issued his decision denying plaintiffs' motion. Appendix, at 5.

On February 24, 1993, plaintiffs filed a notice of appeal to the Sixth Circuit. Extensive briefs were then filed with the Sixth Circuit, and oral arguments were thereafter heard by the Sixth Circuit. On May 26, 1994, the Sixth Circuit, by a *per curiam* memorandum opinion, affirmed the district court's judgment as to both defendants. Appendix, at 1-2; May 26, 1994, Sixth Circuit Court of Appeals Memorandum Opinion.

Thus, after filing numerous motions and briefs and after the issues were reviewed by two separate district court judges and the Sixth Circuit Court of Appeals, the journalized admissions and

General Motors' motion for summary judgment based thereon were upheld. On June 16, 1994, plaintiffs filed a petition for rehearing *en banc*, which was dismissed for having been filed out-of-rule. Appendix, at 3.

On August 24, 1994, an incomplete petition for certiorari was filed with this Court, and it was later amended on September 8, 1994, in order to attempt to comply with this Court's rules of procedure. On its face, the petition shows no good reason for this Court to review the decision of the Sixth Circuit. For the additional reasons set forth below, review by this Court is neither appropriate nor warranted.

SUMMARY OF ARGUMENT

As to defendant General Motors, the decisive facts and proceedings are either admitted by plaintiffs or are not disputed (or cannot be disputed) by them. Before the district court, the plaintiffs completely and totally failed to establish that a defect existed at the time of manufacture of the subject vehicle. In addition, plaintiffs judicially admitted that the subject vehicle was free of defects in design and manufacture and that Mr. Setola's failure to provide an assured clear distance caused the involved accident. The summary judgment rendered by the district court and its affirmance by the court of appeals were both legally correct. Indeed, all of the judges below have so agreed.

Like plaintiffs' belated and misguided efforts to develop post-judgment genuine issues of material fact, plaintiffs' attempts to challenge the applicable law are faulty and have correctly been so held below. There is no unusual feature in this case to attract or merit the attention of, and further consideration by, this Court. It is more than time for the judicial process to end as to this dispute. Certiorari should be denied.

REASONS FOR DENYING THE PETITION

In the initial pages of the petition, eight self-proclaimed "questions presented for review" are stated, and they ramble for approximately six and one-half pages. Petition, at i-vii. Contrary to Rule 14.1(a) of the Rules of the United States Supreme Court, these questions are neither "short" nor "concise," but rather they are "argumentative" and "repetitious" and are also expressed in "unnecessary detail." In the text of the petition, and even though eight so-called questions are presented, there are only four so-called arguments presented. Petition, at 24-48. It is left to the reader's imagination, ingenuity, and mental dexterity to attempt to determine which of these four so-called arguments are intended to apply to which of the eight so-called questions, if any, and to which of the defendants, if any. And, even if a nimble reader could get past these hurdles, the petition still does not provide to such a reader "a ready and adequate understanding of the points requiring consideration." Sup. Ct. R. 14.5. The reader is then further hampered by the petition's additional failures to meet the requirements of "accuracy, brevity, and clearness." Sup. Ct. R. 14.5. Without more, these reasons are "sufficient" for "denying the petition." Sup. Ct. R. 14.5. If the petition is not so denied, it should then be denied for the additional reasons set forth below. Sup. Ct. R. 14.

As to defendant General Motors, all of the pertinent circumstances were carefully considered and determined by both the district court and the court of appeals. Additionally, well-settled principles of law also govern all of the matters set forth in the petition as to defendant General Motors. The applicability of those principles here is heavily underscored by the entire record in the instant action. Those principles display that the decision of the court of appeals in affirming judgment for defendant General Motors was correct and proper. As to defendant General Motors, this is simply not the type of case that either demands or requires this Court's precious time. For the additional reasons set forth below, the petition should be denied.

I. NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS WAS REQUIRED TO PRESUME THAT THERE WAS A "GENUINE ISSUE AS TO ANY MATERIAL FACT" THAT PRECLUDED SUMMARY JUDGMENT.

Rule 56 of the Federal Rules of Civil Procedure provides in most pertinent parts:

> The judgment sought *shall be rendered forthwith* if the pleadings, depositions, answers to interrogatories, and *admissions* on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment *as a matter of law.*

Fed. R. Civ. P. 56(c) (emphasis added).

> When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading*, but the adverse party's response, by affidavits or as otherwise provided in this rule, *must* set forth *specific* facts showing that there is a genuine issue for trial. If the adverse party does not so respond, *summary judgment*, if appropriate, *shall be entered against the adverse party.*

Fed. R. Civ. P. 56(e) (emphasis added). In addition to the language of Rule 56 itself, there are three seminal decisions on it by this Court: *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Each of these three decisions fully supports the decisions of both the district court and the Sixth Circuit in the instant action.

As shown, Rule 56(c) by its terms provides that summary

judgment can be based upon deemed admissions, and it has been repeatedly held that deemed admissions can demonstrate the want of genuine issues of material fact on which a summary judgment may be premised. By its terms, Rule 36(a) also provides in pertinent part that "[e]ach matter of which an admission is requested shall be separately set forth. The matter is deemed admitted, unless thirty (30) days after service of the request . . . , the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . ."

Here, the district court correctly and properly journalized plaintiffs' deemed admissions and then applied those admissions in entering summary judgment in favor of defendant General Motors. Months later, plaintiffs apparently recognized that, with the journalized admissions in effect, the district court had correctly and properly entered summary judgment in favor of defendant General Motors. With such recognition, plaintiffs began their post-judgment attack on the journalized admissions, and they now contend that the district court erred in denying their tardy and otherwise ineffective motion to withdraw those journalized admissions.

In a products liability claim, plaintiffs have the burden of proving: (1) the existence of a defect, (2) that the defect existed at the time it left the manufacturer's hands, and (3) that the defect was the proximate cause of plaintiffs' injuries. *State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, 523 N.E.2d 489 (1988). Unable to prove each of the above elements, plaintiffs have ignored some of the issues by attempting to direct this Court's attention to the third element above, rather than to each required element of their claim. However, plaintiffs' argument not only fails because there is no genuine issue of material fact as to the element of causation, but also because plaintiffs have failed to establish the other requisite elements of their claim.

First, plaintiffs failed to establish a product defect, instead admitting that the Corvette was not defectively designed or

manufactured by General Motors, and then further admitting that Mr. Setola's failure to provide an assured clear distance caused the accident. Plaintiffs cannot avoid these initial admissions by selectively choosing to discuss Mr. Setola's admission that he caused the accident and ignoring the initial admissions that the vehicle was not defective. Moreover, plaintiffs' initial expert, Lawrence F. Wilson, P.E., concluded that it was "impossible" to establish a product defect. Appendix, at 33, October 14, 1992, Memorandum and Order.

Second, plaintiffs also failed to establish that the product defect existed at the time of manufacture. As to defendant General Motors, it is, as a matter of law, not sufficient to establish that a defect, if one, might have existed at some later time. Indeed, plaintiffs' own arguments belie any ability to establish the second requisite element, and they have conceded that their product claim is based on an alleged defect that exited on January 29, 1986, approximately six months after the Corvette was manufactured by General Motors and approximately a month (and also some 7,194 miles) after it was purchased from Schmidt. In their brief to the Sixth Circuit, plaintiffs expressly stated:

> *We claim the Corvette was defective when Mr. Setola received it on January 29, 1986, the day before the injury,* and that Bob Schmidt Chevrolet should have warned him, and Mr. Setola would not have driven the Corvette on the occasion which resulted in his injury.

Brief of Plaintiffs-Appellants Frank Setola and Cheryl Setola, filed with the Sixth Circuit Court of Appeals, at 27 (emphasis added). Accordingly, as to defendant General Motors, plaintiffs have conceded that the alleged defect did not exist at the time of manufacture, and they cannot establish the second element of their product claim. *See, State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St.3d 1, 523 N.E.2d 489 (1988).

Third, the district court stated: ". . . as to the product liability

claim, the Court must also find in favor of the defendant on the issue of proximate cause as there is an absence of evidence to the contrary." Appendix, at 33, October 14, 1992, Memorandum and Order.

Under all of the present circumstances, an exhaustive recapitulation, especially in view of the journalized admissions, is not needed. Here, the claim which plaintiffs have attempted to assert against defendant General Motors has been made from whole cloth. Fortunately, however, an expensive, time-consuming, and unwarranted trial of this meritless action is not required. The plaintiffs simply could not make "genuine" issues of "material" facts from their whole cloth to preclude judgment. Unsubstantiated, self-serving declarations and the like are not sufficient substitutes for "genuine issue[s] as to any material fact." Similarly, and also contrary to plaintiffs' transparent assertions, disputes over incidental and insignificant matters, which occur in virtually all litigation, are not controlling.

In the instant action, neither the district court nor the court of appeals was required to presume that there was a "genuine issue as to any material fact" that precluded judgment for defendant General Motors. Before the district court, plaintiffs, in the face of the involved journalized admissions, did not, and could not, "make a showing sufficient to establish the existence" of each of the essential elements of their case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In so failing, plaintiffs have already taken more than their share of the resources and energies of the judicial system and their opposing litigants. By the petition, this Court, although already needlessly and unjustifiably burdened by plaintiffs, now has an opportunity to promote further the interests and administration of justice by endorsing the usages of the judicial procedures used by both the district court and the court of appeals. This Court should now take full advantage of this opportunity by declining further review of the decisions below.

II. AFTER THE DISTRICT COURT HAS CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF A DEFENDANT AND HAS THEN CORRECTLY DENIED THE PLAINTIFFS' MOTION FOR RECONSIDERATION AND ALSO AFTER THE COURT OF APPEALS HAS CORRECTLY AFFIRMED THAT JUDGMENT AND HAS THEN CORRECTLY REFUSED THE FILING OF AN UNTIMELY PETITION FOR REHEARING *EN BANC*, THERE IS NO NEED FOR FURTHER REVIEW BY THIS COURT.

Plaintiffs' motion to withdraw their admissions, filed approximately seven months after the district court had entered summary judgment in favor of defendant General Motors, is governed by Rule 36 of the Federal Rules of Civil Procedure. Rule 36(b) states in pertinent part:

> (b) **Effect of Admission**. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. . . .

Fed. R. Civ. P. 36(b).

Rule 36(b) empowers the district court with substantial discretion in deciding whether to allow withdrawal of an admission. Vesting district courts with such discretionary power to deny a motion to withdraw is essential in order for Rule 36 admissions effectively to narrow issues and facilitate the resolution of claims. Fed. R. Civ. P. 36, Advisory Committee Note

of 1970.This function is lost if deemed admissions can later be challenged without justification. To that end, numerous courts have denied a party's motion to withdraw in order to give effect to the meaning and spirit behind Rule 36 and also to prevent the prejudice caused by the withdrawal of admissions. *See Developments in the Law-Discovery*, 74 Harv. L. Rev. 940, 969-70 (1961), fn 1, *infra*, at 18.

In denying a party's motion to withdraw under Rule 36(b), other courts, as well as the district court in its November 4, 1991, order, have also acknowledged and accepted the results in doing so. In particular, the courts have recognized that the enforcement of Rule 36 admissions may properly serve to terminate an action in the case of summary judgment proceedings:

> To permit plaintiff now to contest in a Rule 56 procedure a matter which has been concluded under Rule 36 would permit plaintiff to subvert the purpose of Rule 36 by simply ignoring it. Allowing such a result would render Rule 36 meaningless. This could not have been the intention in the adoption of the rule. (Citation omitted.) It will not be the result permitted in this case. The clear intent may be found in the amendment adding Rule 36(b) in 1970. While the loss to a party of his right to contest a matter on its merits is not to be treated lightly, where that loss results from the party's own failure to file an answer to requests for admission and further its failure to utilize the procedures provided in Rule 36 to rectify the deficiency, the loss is a casualty of the court's obligation to process cases to disposition in an orderly, effective, expeditious manner and in accordance with its published rules.

O'Bryant v. Allstate Ins. Co., 107 F.R.D. 45, 48 (D. Conn. 1985).

Rule 36(b) sets forth a two-part test that empowers a court to permit withdrawal or amendment of admissions only after

determining: (1) that the presentation of the merits of the action will be subserved; and (2) that the party who obtained the admission will not be prejudiced. As the district court noted in this action, even if both prerequisites of Rule 36 are met, a district court, in the exercise of its discretion, may still properly refuse to permit withdrawal. Appendix, at 43-44, August 4, 1992, Memorandum and Order, at 4. In confirming these principles, the Second Circuit in *Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650 (2d Cir. 1983), stated:

> "[T]he court *may permit* withdrawal [of admissions] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Fed.R.Civ.P. 36(b) (emphasis added). Thus, the court has the power to make exceptions to the Rule only when (1) the presentation of the merits will be aided *and* (2) no prejudice to the party obtaining the admission will result. Because the language of the Rule is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule (citation omitted). Vesting such power in the district court is essential for Rule 36 admissions effectively to narrow issues and speed the resolution of claims. (Citation omitted.)

703 F.2d at 652. The standard is even higher when the case has proceeded to trial, when a district court may grant the motion only if it finds that so doing would be necessary to prevent "manifest injustice." Fed. R. Civ. P. 36(b). *See Brook Village North Associates v. General Electric Co.*, 686 F.2d 66 (1st Cir. 1982).

In *Weva Oil Corp. v. Belco Petroleum Corporation*, 68 F.R.D. 663 (N.D. W. Va. 1975), the district court denied a motion to vacate admissions and stated:

> In the instant case, permitting *Weva* to respond out of time would prejudice *Belco* by requiring it to prove matters contained in its requests for admissions as evidence in its Exhibit No. 13. From the record before the court, it can be ascertained that while the introduction of such evidence could in all probability be accomplished, the task would be lengthy, laborious, and extremely costly to *Belco*. In considering the weight of prejudice in such circumstances, the court must not treat lightly such burdens when visited upon a litigant, especially when that litigant has properly utilized the Rules of Civil Procedure to advance his litigation toward a "... [j]ust, speedy and inexpensive ..." (Rule 1, F.R.C.P.) conclusion. The express language of the Federal Rules of Civil Procedure as well as the spirit of the Rules support, it seems, *Belco's* position in this issue. Moreover, were the court to grant relief on the facts here presented, *i.e.*, an alleged procedural error, unsupported by affidavit, deposition or otherwise, in the office of the non-responding party's attorney, the result would be to totally nullify the time requirements set forth in Rule 36(a). . . .

68 F.R.D. at 666-667.[1]

When such governing legal principles are coupled with the

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1. Among the numerous other decisions by both courts of appeals and district courts supporting the decisions below here, *see also*: *U.S. v. Kasuboski*, 834 F.2d 1345, 1349-1350 (7th Cir. 1987); *999 v. C.I.T. Corp.*, 776 F.2d 866, 869-870 (9th Cir. 1985); *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 548-549 (5th Cir. 1985); *In re Narowetz Mechanical Contractors, Inc.*, 99 Bankr. 850, 861 (N.D. Ill, E.D. 1989); *Gardner v. Borden, Inc.*, 110 F.R.D. 696, 697 (D. W.V. 1986); *In re Hartwig Poultry, Inc.*, 54 Bankr. 37, 39 (Bankr. N.D. Ohio 1985); *In re Bell & Beckwith*, 50 Bankr. 419, 421 (Bankr. N.D. Ohio 1985); *Kleckner v. Glover Trucking Corp.*, 103 F.R.D. 553, 557 (M.D. Pa. 1984); *EEOC v. Baby Products Co., Inc.*, 89 F.R.D. 129, 131 (E.D. Mich. 1981).

entire record in the instant action, the complete absence of any need for further review by this Court becomes, if possible, even more clear. Only several points will be reiterated here.

The record is replete with examples of non-cooperation and untimely responses by plaintiffs. These delays perpetuated this case indefinitely, resulting in considerable prejudice to defendant General Motors, as well as expenditures of the courts' and the parties' resources and energies in litigating this case.

From the time General Motors served its discovery and requests for admission, plaintiffs delayed, avoided, and ignored the requests for admissions until they finally took issue with them approximately 19 months after they were served. In so doing, plaintiffs utterly failed to take any responsive action. In fact, even after summary judgment in favor of defendant General Motors was entered on November 4, 1991, approximately seven additional months passed before plaintiffs acted. Even then, it was because of defendant Schmidt's then pending motion for summary judgment that plaintiff even bothered to file their Rule 36 motion. Even with plaintiffs' belated and defective motion, plaintiffs presented no satisfactory reason in attempted justification either of their continuing dilatory conduct or of their continuing efforts to inflict prejudice on defendant General Motors, including the continuing costs and expenses associated with this litigation.

Based on these circumstances, the district court stated in its August 4, 1992, order:

> Plaintiffs place great emphasis on the assertion that defendants have the burden of demonstrating prejudice by virtue of lost evidence. GM disputes this statement arguing that the loss of evidence may be a factor in establishing prejudice to its case. This Court agrees. The party opposing the withdrawal must demonstrate that it will be prejudiced in maintaining a defense. *See 999 v. C.I.T. Corp.*, 776 F.2d. 866 (9th

> Cir. 1985). In this case, GM relied upon the journalized admissions when it submitted its motion for summary judgment on June 12, 1991. In fact, the docket sheet indicates that any discovery on the part of GM ceased after the filing of Officer Thomas G. Medon's deposition. See, Docket Nos. 25 and 26. Certainly, after GM prevailed on the motion for summary judgment and was dismissed from the case, it would not be expected to continue to prepare its case. At this point, seven months after the admissions were deemed admitted, GM relied upon the effect of the admissions and assumed that its role in the case was concluded. For plaintiffs to submit their motion to withdraw admissions seven months after the journalized admissions were deemed admitted would no doubt prejudice defendant's case. . . .

Appendix, at 41-43, August 4, 1992, Memorandum and Order. The district court recognized that there was prejudice to General Motors inherent in the following: plaintiffs' dilatory conduct; this defendant's reliance on plaintiffs' journalized admissions in obtaining summary judgment; plaintiffs' long delay in filing the motion to withdraw these journalized admissions months after this defendant's role had been concluded in this action; and this defendant's continuing expenditures of considerable time and costs. Accordingly, the district court, in exercising its discretion, properly denied plaintiffs' motion to withdraw the journalized admissions.

On October 14, 1992, the district court reaffirmed its rulings when it denied plaintiffs' motion to reconsider, stating:

> In the case *sub judice,* plaintiffs present no justifiable reason for consideration of the previous decision. Instead, plaintiffs' argue that defendant's motion to journalize the admissions came as a surprise as GM failed to utilize Local Rule 3.04 to convey the

> seriousness of the admissions. Counsel for plaintiffs indicates that had this procedure been implemented, "the matters would have been worked out". However, counsel for plaintiffs should be aware that requests for admissions and response time thereto is clearly addressed within the Federal Rules of Civil Procedure and does not require more of opposing counsel before seeking journalization of admissions. Plaintiffs' motion for reconsideration is not well taken. . . .

Appendix, at 17-18, August 4, 1992, Memorandum and Order.

In view of all of the foregoing, it is clear beyond cavil that the district court's judgment was correctly and properly affirmed by the court of appeals. As a matter of law, defendant General Motors was entitled to judgment. For these reasons alone, and there are more, there is no need, either real or imagined, for further review by this Court.

III. AFTER BOTH THE DISTRICT COURT AND THE COURT OF APPEALS HAVE FULLY EXAMINED AND CONSIDERED PLAINTIFFS' ASSERTED CLAIM AGAINST A DEFENDANT AND HAVE RENDERED CORRECT DECISIONS ADVERSE TO PLAINTIFFS, THIS COURT SHOULD NOT BE PERSUADED EITHER BY UNSUPPORTED AND UNSUPPORTABLE ARGUMENTS OR BY MEANINGLESS ARGUMENTS TO PERMIT FURTHER REVIEW AND THEREBY UNNECESSARILY TO BURDEN FURTHER ITS DOCKET.

Since the basic reasons and authorities why defendant General Motors was entitled to judgment in the district court have previously been set forth either by that court or by the Sixth Circuit, or by both of them, and also in this brief and remain unimpaired by the petition, those matters need not again be reiterated. Instead, this section of this brief will be confined to responding to the petition and only to those points which might

possibly suggest any desirability of any response at all. So structured, this section of this brief will also not attempt to treat each and every irrelevancy, transparency, and the like in the petition, which, in the absence of a requirement to do so, would only unduly and needlessly burden the Court.

Plaintiffs have advanced essentially the same arguments which were rejected either by the district court or by the Sixth Circuit, or by both of them. In the petition, such arguments are styled under four headings. Each of these four arguments is meritless as to defendant General Motors, and each will be noted briefly below.

First, plaintiffs argue what they perceive to be the merits of their case by attempting to attack the district court's decision in journalizing defendant General Motors' requests for admissions. Petition, at 24. Only a few comments, if indeed any, are appropriate with respect to such argument here.

In making this first argument, plaintiffs basically set forth the same arguments that they made to, and were rejected by, the district court and the Sixth Circuit. Indeed, the plaintiffs even quote extensively from one of their prior briefs to the Sixth Circuit. Petition, at 26, 27, 28, 29.

In making this first argument, plaintiffs also basically overlook (and conveniently so), among so much else, that the so-called affidavits on which they now claim to rely as to the perceived merits of their case were filed long after defendant General Motors had served its requests for admissions on plaintiffs and even after the district court had journalized the deemed admissions and that plaintiffs did absolutely nothing as to those requests during that entire lengthy period. Indeed, it was not until June 17, 1992, approximately 12 months after defendant General Motors had filed its motion for summary judgment and approximately seven months after the district court had entered summary in favor of defendant General Motors, that plaintiffs filed

a Rule 36(b) motion to withdraw those admissions and to vacate that summary judgment. Even if the facts were otherwise (and they are not), it is far too late for plaintiffs to be arguing what they perceive to be the merits of their case as to the involved 1986 accident.

In making this first argument, plaintiffs also basically overlook (and again conveniently so) the status of the instant action. Both the district court and the Sixth Circuit have held that defendant General Motors was entitled to summary judgment. As a result, plaintiffs' argument as to the perceived merits of their case, even if they were otherwise valid (and they are not), only very belatedly raises inappropriate issues now. The district court correctly and properly granted summary judgment in favor of defendant General Motors on November 4, 1991. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986). The Sixth Circuit correctly and properly affirmed that judgment on May 26, 1994. Plaintiffs' first argument should be rejected.

Second, plaintiffs argue that "there is need for *proper* direction from this Court" with respect to Rule 36. Petition, at 41 (emphasis in original). In making this argument, however, plaintiffs admit, as they must, that they are, at least, "chargeable with delay." Petition, at 33.

In attempted support of this second argument, plaintiffs basically ignore the record in the instant action and then cite four decisions. The underlying faulty premises of this argument by plaintiffs have been previously exposed in this brief and elsewhere. In addition, and as demonstrated below, none of these four decisions even begins to lend support to plaintiffs' position here.

The first of these four decisions cited by plaintiffs is *Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309 (8th Cir. 1983). Petition, at

34. Plaintiffs' discussion of that decision is, to say the least, inadequate. There, the defendant served requests for admissions on plaintiff; plaintiff's attorneys changed three times because of conflicts of interests; in the meantime, the response date for filing answers to the requests for admissions passed; on the same day that plaintiff's third attorney sought leave to file answers to the defendant's requests for admissions, the defendant also filed a motion for summary judgment. Without more, the facts there are decisively different from the facts here. Equally important, the Eighth Circuit made clear that the standard for permitting untimely responses under Rule 36 was one of discretion and stated:

> Because the district court has the power to allow a longer time, courts and commentators view this to mean that the court, in its discretion, may permit the filing of an answer that would otherwise be untimely. . . . Similarly, the granting of a motion to file the answers out of time is limited by the court's discretion.

710 F.2d at 1312-1313. There, the district court abused its discretion, and the court of appeals so held; here, the district court did not abuse its discretion, and the court of appeals so held.

The second of these four decisions cited by plaintiffs is *Smith v. First Nat. Bank of Atlanta*, 837 F.2d 1575 (11th Cir.,), *cert. denied*, 488 U.S. 221 (1988). Unfortunately, the facts upon which this decision was based are set forth in an unpublished opinion. Even so, the facts that are revealed in this decision are vastly different from those involved here. Primarily, of course, and unlike here, "the district court noted that the defendant's failure to timely respond to Smith's request for admission was inadvertent and `at most excusable neglect.' There is nothing in the record that shows such finding was clearly erroneous." 837 F.2d at 1577. In addition, and again unlike here, the defendant responded before judgment was entered. Even without additional facts, it is clear that the facts involved there were vastly different from those involved here.

That the Eleventh Circuit's views in the above-noted decision do not support plaintiffs' position here is further demonstrated by subsequent decisions of the Eleventh Circuit. For example, in the more recent decision of *U.S. v. 2204 Barbara Lane*, 960 F.2d 126 (11th Cir. 1992), the district court granted summary judgment in favor of the plaintiff based on pleadings and unanswered requests for admissions, and the Eleventh Circuit affirmed. After reviewing some of the recent decisions in which summary judgment based on journalized admissions had been upheld, the Eleventh Circuit then stated in language fully applicable here:

> Roberts [the defendant] was free to timely answer or object to the request and proceed through discovery to trial, but his silence conclusively established the government's case.

960 F.2d at 130. Like defendant there, the plaintiffs here neither answered nor objected, and their "silence conclusively established" defendant General Motors' case.

The third of these four decisions cited by plaintiffs is *Farr Man & Co., Inc. v. M/V Rozita*, 903 F.2d 871 (1st Cir. 1990). On facts not remotely comparable to the facts involved here, the district court held that there was "no unfairness in relieving the defendant of admissions *which are conceded to have been incorrect.*" 903 F.2d at 876 (emphasis added). In view of this concession, the First Circuit, after noting that the higher standard of manifest injustice was applicable because the trial had begun, held that the higher standard had been met "because, as the district court noted, the most current stipulation of facts sets the damages suffered by plaintiffs at $29,268.63, rather than the amount admitted to of $285,268.63 . . . [and] allowing that admission [of $285,268.63] to stand would have been manifestly unjust" and then held that the district court had appropriately permitted the defendant to withdraw its admissions. 903 F.2d at 876, 877. Clearly, the facts involved there are in no manner even comparable

to the facts involved here, and the First Circuit's discussion of Rule 36 fails to support plaintiffs' position here, but rather it further supports defendant General Motors' position here. Here, too, the district court, with "considerable discretion," correctly and properly denied plaintiffs' very belated post-judgment attempts to withdraw their admissions, and the Sixth Circuit, reviewing "only for abuse of discretion" as to those admissions, correctly and properly affirmed the district court's decision of summary judgment in favor of defendant General Motors. 903 F.2d at 876.

The fourth of these four decisions cited (but without an actual citation as such) by plaintiffs is *St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355 (W.D. Mich. 1980). The facts involved there have no resemblance whatsoever to the facts involved here. 86 F.R.D. at 357. Under the unusual circumstances involved there, the district court held that the issue as to whether or not to permit late responses was one of discretion and that, in the exercise of its discretion, late responses would be permitted. Moreover, the district court's basic holding further supports defendant General Motors' position here. In addition, the plaintiffs' assertion here that such decision stands for the proposition that "withdrawal of admissions was allowed almost 4 years later" is, at best, simply just another misleading assertion by plaintiffs. Petition, at 41. The district court, after noting that a stipulation for time had been entered by the parties and that a motion to quash the requests for admissions had been filed by defendants early in the lawsuit, specifically held that "the period of unexcused lateness, therefore, is merely from March 31, 1976 to May 14, 1976, a period of forty-four (44) days." 86 F.R.D. at 356.

Thus, none of the four decisions cited by plaintiffs even begins to lend support to plaintiffs' position here. Indeed, each of such four decisions supports in one way or another, or more, defendant General Motors' position here.

In attempted support of this second argument, plaintiffs also attempt to assert that there is "confusion" with respect to Rule 36

among the various decisions of the district courts and the courts of appeals. Petition, at 41. There is simply no such "confusion" with respect to Rule 36 as asserted by plaintiffs. As one standard text, in summarizing the decisions under Rule 36 and also the governing principles applicable here, states in straight-forward language:

> The 1970 amendments made it *plain* that any matter admitted under Rule 36 is conclusively established unless the court permits withdrawal or amendment of the admission. Summary judgment can then be granted, in whole or in part, on the basis of facts actually admitted, or on facts deemed admitted . . . .

4A *Moore's Federal Practice*, ¶36.08 (2d ed. 1994), at 36-75 and 36-76 (footnotes omitted; emphasis added). The only real demonstration of "confusion" comes from the petition itself. Most tellingly, but among other choices, plaintiffs even fail to recognize the differences between Rule 36 and Rule 37.

> Mere delay in answering Interrogatories does not result in dismissal; only failure to respond to a Court Order to answer Interrogatories.

Petition, at 41. Finally, even if there were "confusion" with respect to Rule 36 among the various decisions of the district court and the courts of appeals (and plaintiffs have completely and totally failed to so demonstrate), plaintiffs, as the record in the instant action demonstrates beyond cavil, are in no position to seek "*proper* direction from this Court." Petition, at 41 (emphasis in original).

Additional comments as to plaintiffs' second argument would appear to be singularly inappropriate. Here, plaintiffs are admittedly "chargeable with delay." Petition, at 33. Even more significantly, it was not until June 17, 1992, approximately twelve months after defendant General Motors had filed its motion for summary judgment and approximately seven months after the district court had entered summary judgment in favor of defendant

General Motors, that plaintiffs even bothered to attempt to withdraw the previously-journalized admissions and to vacate the summary judgment in favor of defendant General Motors. Plaintiffs' second argument should be rejected.

Third, plaintiffs argue that "this Court . . . [should] direct a return to basic American Values." Petition, at 44. In attempted support of this third argument, the plaintiffs initially cite one of their own prior briefs to the Sixth Circuit. Petition, at 43. The referenced matters in that brief are clearly not pertinent here, and, by affirming the district court's decision, the Sixth Circuit has also agreed that such referenced matters are not pertinent here. The plaintiffs then cite, but without meaningful discussion, and also apparently without understanding, two decisions by this Court: *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and *National Hockey League v. Met. Hockey Club*, 427 U.S. 639 (1976). Petition, at 44. The facts in each of these two decisions are so completely and totally different from the facts involved here that comparisons are impossible; in addition, each of these two decisions was based on Rule 37, not Rule 36. 357 U.S. at 207, 211; 427 U.S. at 639, 642-643. Without more, neither of these two decision provides any support whatsoever as to plaintiffs' position here.

This third argument then concludes with the plea: "We ask this Court to direct a return to basic American Values." Petition, at 44. If a plea of this type for direction by plaintiffs were even appropriate here, certainly any resultant direction would include a direction to plaintiffs to follow the basic American rules of civil litigation, including the Federal Rules of Civil Procedure. Any additional comments by defendant General Motors as to this third argument would be both inappropriate and unwarranted.

Fourth, plaintiffs argue that a "trial court" should be required, "before entering an order of dismissal," to "point out" any "found deficiencies in" affidavits. Petition, at 45. By its own terms, this argument is directed to "Mr. Setola's Affidavit of January 7, 1992,

App. 58." Petition, at 45. As shown, said affidavit, which consists of 28 pages, was filed on January 7, 1992. Since the district court had previously granted defendant General Motors' motion for summary judgment on November 4, 1991, only a few comments, if indeed any, by defendant General Motors are appropriate with respect to such argument here.

In attempted support of this fourth argument, the plaintiffs quote at length, approximately three single-spaced pages, from one of their own prior briefs to the Sixth Circuit. Petition, at 45A, 46, 47, and 48, in part. Here, the district court (and long after it had granted defendant General Motors' motion for summary judgment) correctly and properly determined that defendant Schmidt's motion to strike Mr. Setola's affidavit was "well taken." Appendix, at 21-22, October 14, 1992, Memorandum and Order. Obviously, the Sixth Circuit, after "having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties" and then affirming, also correctly and properly rejected the underlying premises of this argument. Appendix, at 1-2.

To this Court, the plaintiffs present nothing new, but rather they merely quote at length from a prior brief to the Sixth Circuit. Without more, plaintiffs' fourth argument should be rejected. In addition, plaintiffs' suggestions, if adopted, would impose additional burdens on an ever-increasingly busy judiciary. And, of course, plaintiffs' suggestions, if adopted, would be unjust as to all other parties, would cause additional delays, and would cause increased expenses. Such results would all be in direct conflict with the stated purposes of the Federal Rules of Civil Procedure.

> They [these rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1. For these reasons alone, and there are others, plaintiffs' fourth argument should also be quickly rejected.

When, as here, both the district court and the court of appeals have fully examined and considered plaintiffs' asserted claim against defendant General Motors and have rendered correct decisions adverse to plaintiffs, this Court should not be persuaded either by unsupported and unsupportable arguments or by meaningless argument to permit further review. Under these circumstances, further review is neither warranted nor appropriate, and it should be declined.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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October 11, 1994

OPPOSITION APPENDIX A: MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED APRIL 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:90CV7317

FRANK SETOLA, et al.,

Plaintiff(s),

-vs-

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant(s).

MEMORANDUM AND ORDER

WALINSKI, J.

This matter is before the Court on defendants' motion to compel and motion to journalize admissions. Also before the Court is plaintiffs' motion for extension of time to respond to defendants' motion to journalize admissions. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Defendants seek to compel answers to their first set of interrogatories and requests for production of documents which were mailed to plaintiffs at the beginning of November 1990. Plaintiffs have allegedly failed to submit answers despite repeated

requests by defendants' counsel. In support of their contentions, defendants submit letters to plaintiffs' counsel which attempted to resolve the delay. The Court finds that defendants have complied with Local Rule 3.04.

However, on March 20, plaintiffs submitted and were granted an extension of time until April 11, 1991 to answer the interrogatories. The Court is not aware that plaintiffs have failed to comply with that deadline and therefore assumes the answers were filed. Defendants' motion is therefore denied. However, defendants may refile their motion if in fact plaintiffs have failed to comply with the April 11 deadline.

Also before the Court is defendants' motion to journalize the admissions served upon plaintiffs on November 13, 1990. Under Rule 36:

> A party may serve upon any other party a written request for the admission, for the purposes of a pending action only, the truth of any matters within the scope of Rule 26(b) . . .
>
> The matter is *admitted* unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney . . .

Fed. R. Civ. P. 36(a). Failure to respond to a request for admissions serves to deem them admitted. *Smith v. First National Bank of Atlanta,* 837 F.2d 1575 (11th Cir. 1988).

Opposition Appendix A

In the case *sub judice,* defendants submit that plaintiffs have failed to respond to the requests served upon them. Plaintiffs seek an extension of time until April 17, 1991 to respond to defendants' motion. Plaintiffs had until December 17, 1990 to respond to the requests or in the alternative seek an extension of time as to the requests. Plaintiffs did neither. As they failed to respond in a timely fashion the Court finds defendants' motion well taken and the requests are deemed admitted.

Accordingly, plaintiffs (sic) motion for an extension of time is denied. It is therefore,

ORDERED that defendants' motion to compel is denied.

FURTHER ORDERED that defendants' motion to journalize admissions is granted. Request for admissions No. 1 through 4 of defendants' exhibit A are deemed admitted.

FURTHER ORDERED that plaintiffs (sic) motion for an extension of time is denied.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
April 10, 1991

OPPOSITION APPENDIX B: MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED NOVEMBER 4, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:90CV7317

FRANK SETOLA, et al.,

Plaintiff(s),

-vs-

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant(s).

MEMORANDUM AND ORDER

WALINSKI, J.

This matter is before the Court on defendants' motion for summary judgment and a motion to strike certain affidavits. Plaintiffs submit their opposition thereto. Jurisdiction is based upon 28 U.S.C. § 1332. The Court finds defendants' motions well taken and grants the same.

This is a personal injury case which originally was filed in state court and voluntarily dismissed. As plaintiffs moved out of state, they refiled the action in this Court claiming diversity jurisdiction.

Opposition Appendix B

Plaintiff Frank Setola and his wife Cheryl ("Setola") bring this action against both Bob Schmidt Chevrolet ("Bob Schmidt") and General Motors Corporation ("General Motors"). On December 3, 1985 Setola purchased a new 1985 Chevrolet Corvette from defendant Bob Schmidt. On January 30, 1986 Setola and the car were involved in an accident with another vehicle which resulted in Setola being issued a citation for failure to maintain assured clear distance. Between the date the car was purchased and the accident, plaintiffs took the car for service and repairs at Bob Schmidt.

Plaintiffs allege defective design, defective manufacture, breach of warranty, breach of contract, failure to warn and negligence. General Motors moves for summary judgment and to strike affidavits submitted by plaintiffs.

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. *United States v. Articles of Device*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n

ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts, viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. *Smith v. Pan Am World Airways,* 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. at 324.

Opposition Appendix B

The law of Ohio is well settled on the elements to be proven in a products liability case. It must be demonstrated by a preponderance of the evidence that:

> (1) there was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of defendants; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss.

Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966). *See State Auto Mut (sic)Ins. Co. v. Chrysler Corp.*, 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973); *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977); *Friedman v. General Motors Corp.*, 43 Ohio St. 2d 209, 331 N.E.2d 702 (1975); *Bowling v. Heil Co.*, 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987); *State Farm Fire & Casualty Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, (sic) (1988).

Previously this Court granted defendants' motion to journalize and deem admitted the following:

> *Request for Admission No. 1:* Please admit that there was and is no contract between plaintiffs and General Motors Corporation in respect of this 1985 Corvette.
>
> *Request for Admission No. 2:* Please admit that this 1985 Chevrolet Corvette was not defectively designed by defendant G.M.
>
> *Request for Admission No. 3:* Please admit

> that this 1985 Chevrolet Corvette was not defectively manufactured by defendant G.M.
>
> *Request for Admission No. 4:* Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.

See, Order dated April 10, 1991. It is on the basis of these admissions that General Motors seeks summary judgment of the claims asserted by plaintiffs.

Plaintiffs assert that these admissions do not preclude their right to recover under theories of strict liability and breach of warranty. Plaintiffs are correct in their recitation of the law as it pertains to strict liability in tort. *See, Lonzrick, supra.*

However, through the journalized admissions, there is no genuine issue of material fact left as to the alleged defect. Plaintiffs have clearly admitted that no defect existed when the automobile left General Motors' hands. Moreover, plaintiffs admit that the cause of the January 1986 collision was caused by Frank Setola. Plaintiffs take issue with that admission claiming that Setola's actions were not the *sole* cause of the accident. While plaintiffs choose at this late date to argue about semantics, this Court will not entertain such claims as those should have been dealt with at the time the admissions were served upon plaintiffs.

As to the claim for breach of warranty, plaintiffs allege that the question of proximate cause is a question for the jury. Ordinarily this is true where the facts are in dispute, but again plaintiffs have admitted through Admission No. 4 that the accident was caused by Setola. It thus appears that there exists no genuine issue of material

fact left for a jury as to the state of the car when it left General Motors or the proximate cause of the accident.

Plaintiffs attempt to overcome the admissions through a series of affidavits which defendants have moved to have stricken for noncompliance with the Fed. R. Civ. P. 56(e). The Court notes that the admissions were served upon plaintiffs on November 13, 1990. It was not until April 5, 1991, almost five months later, that plaintiffs moved for an extension of time to respond to the admissions. Thereafter, on April 10, 1991, the Court granted defendants' motion to admit the admissions.

The effect of Rule 36 is clear:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawl (sic) or amendment of the admission . . .

Fed. R. Civ. P. 36(e) (sic). Once such matters are admitted, summary judgment can be granted on the basis of the admissions. 4A J. Moore & J. Lucas, Moore's Federal Practice ¶ 36.08 (2d ed. 1991). *See, United States v. Kasuboski,* 834 F.2d 1345 (7th Cir. 1987); *Donovan v. Carls Drug Co.,* 703 F.2d 650 (2d Cir. 1983); *United States v. Kenealy,* 646 F.2d 699 (1st Cir.,), *cert. denied,* 454 U.S. 941 (1981). Default admissions cannot later be attacked on the basis of affidavits contained within an opposition to summary judgment. *O'Bryant v. Allstate Ins. Co.,* 107 F.R.D. 45 (D. Conn. 1985).

While the effect of the above admissions is clear, to allow plaintiffs at this juncture to attack the issues contained in the admissions is to disregard the letter of the law and reward plaintiffs

for their inaction. Accordingly, the Court finds that the admissions are properly applied to the motion for summary judgment. There exists no genuine issue of material fact and as a matter of law, General Motors is entitled to summary judgment on all claims.

Based upon the above determination, the Court finds that defendants' motion to strike the affidavits is denied as moot.

Therefore, it is

ORDERED that defendants' motion for summary judgment is granted.

FURTHER ORDERED that defendants' motion to strike is denied as moot.

FURTHER ORDERED that General Motors is dismissed from this action.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
November 4, 1991

OPPOSITION

BRIEF

No. 94-440

Supreme Court, U.S.
FILED
NOV 9 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

FRANK SETOLA, *et al.*,

Petitioners,

vs.

BOB SCHMIDT CHEVROLET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BOB SCHMIDT CHEVROLET, INC.

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QUESTIONS PRESENTED

As this Petition applies to Respondent Bob Schmidt Chevrolet, Inc., the following questions are presented:

1. Whether the summary judgment granted by the district court in favor of Respondent Bob Schmidt Chevrolet, Inc., and affirmed by the court of appeals, was incorrect as a matter of law.

2. Whether the district court committed prejudicial error by striking certain affidavits submitted by Petitioners, and whether said decision was incorrectly affirmed by the court of appeals.

3. Whether the conduct of Petitioners in repeatedly ignoring the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence, warrants the granting of a petition for review by this Court.

PARTIES TO THE PROCEEDING

Respondent Bob Schmidt Chevrolet, Inc. adopts and incorporates by reference the statement as to the parties of the Respondent General Motors Corporation contained in its Brief in Opposition filed on October 11, 1994.

Respondent Bob Schmidt Chevrolet, Inc. will use the nomenclature adopted by co-Respondent General Motors when referring to the parties to this action.

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STATEMENT OF THE CASE

A. Introduction and Proceedings Below

Respondent Bob Schmidt Chevrolet, Inc. (hereinafter "Respondent Bob Schmidt" or "Bob Schmidt") sets forth this brief Statement of the Case. This Statement will include the nature of the case, the course of the proceedings in the lower court, and the disposition of the case. Due to the protracted nature of the litigation and, in the interest of judicial economy, many of the extraneous details will necessarily be eliminated from this Statement. The docket relative to this case, which includes well over one hundred entries, is evidence of the quantity of filings submitted to the district court. In their Statement, Petitioners included many extraneous facts and allegations purporting to be facts which tend to obfuscate the issues herein. This Respondent will restrict its consideration to those facts supported by admissible evidence and germane to the issues before this Court.

This is a personal injury case wherein the Petitioner Frank Setola claims injuries, allegedly as a consequence of a motor vehicle collision that occurred on January 30, 1986. Mr. Setola claims the collision and his alleged injuries resulted from the negligence of Respondents and a defective product, specifically the brakes of the vehicle, manufactured by Respondents General Motors Corporation and Hydramatic Division of General Motors, and sold to Mr. Setola by this Respondent. Petitioner Cheryl Setola raises claims of loss of consortium and loss of services. (Petitioners hereinafter are referred to as such, or as "Mr. Setola" and "Mrs. Setola").

Petitioners originally filed their action against the Respondents, Bob Schmidt Chevrolet, Inc., General Motors Corporation and its Hydramatic Division (hereinafter "General Motors") in the Court of Common Pleas, Lucas County, Ohio on January 29, 1988. During the pendency of the action in state

court, some discovery was undertaken. Petitioners also sought jurisdiction in the federal district court, but the case was remanded due to lack of diversity jurisdiction. On June 22, 1989, the Petitioners voluntarily dismissed their action pursuant to Rule 41(A) of the Ohio Rules of Civil Procedure with the right to re-file within one year. The Petitioners filed their Notice of Dismissal while General Motors' Motion to Dismiss for Want of Prosecution was pending.

The instant action was re-filed in the United States District Court on June 22, 1990, the last possible date on which Petitioners could re-file their lawsuit. Petitioners based the federal court's jurisdiction on diversity, due to their relocation to the State of New Jersey. Petitioners, in this Complaint, alleged that Petitioner Mr. Setola purchased a new 1985 Chevrolet Corvette ("Corvette") from Bob Schmidt on or about December 9, 1985 (the date of purchase was actually December 3, 1985) and that shortly after its purchase, the Corvette experienced braking problems and was taken to Bob Schmidt for repair. (Complaint, paragraph 2). Petitioners further alleged that on or about January 29, 1986, Mr. Setola was injured in the collision as a result of the failure of the Corvette's brakes. (Complaint, paragraph 3).

Petitioners' allegations against Respondents sound in negligence and product liability. The product liability claims are those of defective design, defective manufacture, breach of warranty, breach of contract, breach of representation and failure to warn. Petitioners' allegations of negligence apparently pertained to the alleged failure of Bob Schmidt to repair the Corvette's braking system.

Answers were filed by both Respondents and discovery requests were propounded upon the Petitioners. Bob Schmidt propounded discovery requests in the form of interrogatories and requests for production of documents directed to Petitioners. General Motors propounded a set of interrogatories, requests for

production of documents and requests for admissions upon the Petitioners.

On October 12, 1990, the district court issued an order outlining a litigation management schedule. The order established that a jury trial was to begin on September 9, 1991. The order also established a motion filing deadline of July 9, 1991; discovery was to be completed by June 9, 1991; and, the respondents were granted leave to move for summary judgment.

Petitioners failed to respond to the Respondents' discovery requests. On March 5, 1991, Bob Schmidt filed a motion to compel. On March 18, 1991, General Motors filed a motion for an order journalizing admissions, which order was entered on April 10, 1991.

Subsequent to obtaining the order journalizing admissions, General Motors moved for summary judgment. The motion for summary judgment by General Motors created a flurry of activity by Petitioners. In an effort to preclude an adverse summary judgment decision by the district court, Petitioners filed numerous affidavits and motions, including a motion by Petitioners to vacate the September 9, 1991 trial date.

On November 4, 1991, the district court issued its memorandum and order granting General Motor's motion for summary judgment. Bob Schmidt moved for summary judgment on December 6, 1991. Again, Petitioners filed numerous motions and affidavits, including motions to file supplemental responses and motions to file additional affidavits. Among the motions filed by Petitioners was a motion for withdrawal or amendment of the journalized admissions, which motion was filed on June 17, 1992.

On October 14, 1992, the district court granted Bob

Schmidt's motion for summary judgment and motion to strike the affidavits of Mr. Setola and Mr. Karoly, *inter alia*. This case was terminated by judgment entry on October 16, 1992.

Petitioners continued to seek relief from the district court by filing additional affidavits, a notice of appeal and a motion for reconsideration. The district court issued an order on January 26, 1993, denying Petitioners' motion to alter or amend its prior judgment and denying their motion for reconsideration.

On February 24, 1993, Petitioners filed a notice of appeal to the Sixth Circuit Court of Appeals. All parties filed extensive briefs and oral arguments were heard by the Court on May 10, 1994. On May 16, 1994, the Court issued a *per curiam* decision affirming the decisions of the district court in favor of both Respondents.

B. The Accident and Ancillary Matters

Respondent Bob Schmidt sets forth a brief statement of the accident and other facts that are relevant to the issues raised in Petitioners' Brief and which facts are perceived as applicable to the claims alleged by Petitioners against Bob Schmidt. Each fact is supported by a reference to an entry in the Record.

On January 30, 1986, Petitioner Frank Setola was involved in a motor vehicular collision near the intersection of Anthony Wayne Trail and City Park Drive, in Toledo, Ohio. (Record Entry No. 1). In this collision, Mr. Setola, while operating his Corvette, hit the back of another vehicle that was the second of two vehicles stopped for a red traffic light at the intersection. (Record Entry No. 56, Affidavit attached thereto).

This collision was witnessed by Nancy McCray, the operator of the first of the two vehicles stopped at the intersection waiting

for the light to change. Mrs. McCray testified by affidavit that she observed the Corvette approaching the intersection in the rear view mirror of her vehicle. She stated that the vehicle, which she later discovered to be operated by Mr. Setola, was approaching at such a high rate of speed, she knew that it would be unable to stop and that it would collide with the rear of the vehicle behind hers. (Record Entry No. 56, Affidavit attached thereto).

The accident was investigated at the scene by officers of the Toledo Police Department. One of the investigating officers, Thomas G. Medon, testified in his deposition that Mr. Setola told him that there was some malfunction of the braking system before the accident. (Deposition of Officer Medon, p. 11, Record Entry No. 26). However, Mr. Setola was not able to demonstrate to Officer Medon that any malfunction of the vehicle was at fault in the accident. (Deposition of Officer Medon, pp. 16, 19, 21). Mr. Setola was permitted to retain custody of the Corvette after proving to the investigating officers that the brakes were working. (Deposition of Officer Medon, pp. 12, 24). Officer Medon testified that he observed Mr. Setola move his vehicle and did not observe him having any difficulty stopping the vehicle. (Deposition of Officer Medon, p. 15). Officer Medon further testified that if Mr. Setola had demonstrated to the officers at the scene that the accident was the consequence of brake failure, he would have been issued a citation for mechanical failure of the vehicle and no such citation was issued. (Deposition of Officer Medon, pp. 16, 18, 19).

C. The Vehicle

The vehicle driven by Mr. Setola at the time of the accident was a 1985 Corvette that he had purchased new from Respondent Bob Schmidt on December 3, 1985. Bob Schmidt had previously purchased the Corvette from co-Respondent General Motors.

The service records relating to the Corvette were produced by Bob Schmidt. (Record Entry No. 56, Affidavit attached thereto). John Schaller, Service Manager of Bob Schmidt, testified by Affidavit that he is the custodian of the service records of Bob Schmidt and, as custodian of the service records, caused a search to be made of such records for all of the records pertaining to service or repairs on the Corvette. As a result of the search, five repair orders were located, certified copies of which were attached to the Affidavit of Mr. Schaller and incorporated therein. (Record Entry No. 56, Affidavit attached thereto).

A review of the repair orders reveals that two such orders related to service work performed on the Corvette before Mr. Setola's purchase of it. Three of the repair orders were completed after Mr. Setola's purchase of the Corvette. (Record Entry No. 56, Affidavit attached thereto).

A further review of the five repair orders reveals that the only mention relating to the braking system of the vehicle occurred on December 19, 1985, when Mr. Setola reported that the "rear brakes lock up." However, on December 19, 1985, and before any service was performed on the car, Mr. Setola stated that he could not wait for service and the repair order was marked "void." No work was performed on the Corvette on December 19, 1985. The mileage on the Corvette odometer on December 19, 1985, when the repair order was written, was 3,233. (Record Entry No. 56, Affidavit attached thereto).

Mr. Setola next presented the car to Bob Schmidt for service more than one month later on January 23, 1986. He made no complaint to Bob Schmidt personnel about braking problems on that date. The only notation on this repair order, dated and signed by Frank Setola on Jauary 23, 1986 that may possibly refer to braking function, is: "Ck for rear axle lk at LR wheel + wheel seems to lock up at times." The notation by Bob Schmidt service personnel is "no leaks at this time." The mileage noted on the

repair order dated January 23, 1986 was 7,194. Mr. Setola drove the Corvette another 3,961 miles in the one month period after he had reported to Bob Schmidt that the "rear brakes locked up" but that he did not have time to wait for service on his car. (Record Entry No. 56, Affidavit attached thereto).

Further, Mr. Schaller stated under oath that it is the ordinary and customary practice of Bob Schmidt for its personnel to test drive each vehicle before its delivery to a customer both at the time before its initial delivery from stock and at the time after service work is performed on the vehicle. One of the systems routinely tested by service personnel is the braking system of the vehicle. Mr. Schaller stated that a vehicle would not be released to the customer if the braking system was not functioning properly. (Record EntryNo. 56).

D. Subsequent Expert Investigation of the Accident

After the accident of January 30, 1986, evidence in the record reveals that Mr. Setola's liability carrier employed a professional engineer to investigate the cause of the accident. (Record Entry No. 34, Affidavit attached thereto). The professional engineer, Lawrence P. Wilson, issued a report, which report and an accompanying affidavit were initially submitted as evidence to the lower court by the Petitioners. Mr. Wilson stated in his affidavit that he "was hired to, and did make an investigation into the conditions of the Brake System and constituent parts, all for the Celina Insurance Company, and issued my report of investigation, Report No. 209586; and in the said report I made the statements and observations of facts, and what I did, and what was done at my direction, and all the same are true, to the best of my recollection and true also to my personal knowledge. . ." Mr. Wilson's affidavit indicates that he was present on February 18, 1986, when samples of the Corvette's brake fluid were taken from it. Mr. Wilson's report, dated October 30, 1986, also indicates that the samples were sent

to a laboratory for analysis and that the analysis showed that the brake fluid contained a contaminant, mineral oil. (Record Entry No. 34).

Mr. Wilson's Report also indicates that he was present on May 9, 1986 when parts of the braking system were removed from the Corvette. At that time certain fluid samples from the brake system were taken and these were "divided approximately 50-50 with Mr. Setola's investigator and all of the parts removed from the vehicle were taken by Mr. Setola's investigator for laboratory analysis." The report of Mr. Setola's investigator was apparently received by Mr. Wilson on October 1, 1986, as this report was referenced in Mr. Wilson's report, dated October 30, 1986. The report of Mr. Setola's investigator was also referenced in the letter to Mr. Setola's carrier dated October 30, 1986, which letter was included with the report and affidavit filed by Petitioners with the Court. In pertinent part, Mr. Wilson's letter reads:

> Our investigation of the above claim has been completed and our report is attached hereto. As you know, we were waiting for Mr. Setola's prior attorneys to complete their tests on the brake parts we witnessed removed. *That report was received this month and we see no need to proceed further with our tests.* (Emphasis added).

Mr. Wilson was present at the time the fluid samples were removed on February 18, 1986. He was present when the brake system parts were removed on May 9, 1986. He reviewed the laboratory data, conducted testing, and, after analysis and investigation, decided that the contamination was *not present throughout the braking system and expressly concluded that it could not be determined that the mineral oil contamination had*

any effect on the braking system of the Corvette. In that regard, Mr. Wilson concluded:

> In our opinion, the brake fluid contamination of mineral oil caused the distortion of the master cylinder caps. *It was impossible however, to prove that this had any effect on the braking actions of the vehicle* because no distortions were found in the brake line hoses nor the wheel cylinder caps. (Emphasis added).

(Record Entry No. 34).

The Petitioners' own liability carrier concluded that there was no evidence that the mineral oil contamination in the brake fluid caused the failure of the braking system.

The Petitioners have never offered a report of the results of the investigator hired by Mr. Setola, with whom Mr. Wilson stated that he shared the fluid samples. The only references in the record to an investigator employed by Mr. Setola are contained in the writings of Mr. Wilson. Based upon Mr. Wilson's writings, which include his report of his investigation, and his letter to Mr. Setola's liability carrier, it may be reasonably concluded that the investigator employed by Mr. Setola reached a similar conclusion. Mr. Wilson's aforementioned writings and his accompanying affidavit are properly in the record. (Record Entry No. 34).

No evidence to the contrary has been properly introduced by the Petitioners.

SUMMARY OF ARGUMENT

I. As to this Respondent, Petitioners asserted claims based upon negligence and products liability. Either theory requires a demonstration of proximate causation. Almost seven years elapsed from the date of the accident to the terminating of the litigation by order granting summary judgment. Petitioners, despite the opportunities presented by the significant time period, utterly failed to make a showing sufficient to establish the existence of evidence essential to the elements of their case. The district court and the appellate court properly recognized the utter paucity of evidence by Petitioners. There are no issues presented by Petitioners in their Petition to this Court which warrant review.

II. Upon motion of this Respondent, the district court struck certain affidavits submitted by Petitioners. One affidavit submitted was that of a purported expert. The other affidavit was that of Mr. Setola. Both were properly struck on the grounds that they failed to comply with the requirements of the rules governing admissibility.

III. The dilatory conduct by Petitioners, in and of itself, during the pendency of this litigation is sufficient reason for denial of their Petition.

REASONS FOR DENYING THE WRIT

Respondent Bob Schmidt Chevrolet, Inc. relies upon the reasons as stated previously by co-Respondent General Motors in its Brief in Opposition. Additionally, as to the issues which Petitioners attempt to raise warranting review by this Court as they may specifically apply to Schmidt, this Respondent states that the evidence and the facts have been thoroughly reviewed by the District Court and further reviewed by the Court of Appeals. The appellate court upheld the findings of the district court. Petitioners have failed to demonstrate that the lower courts

committed an obvious and exceptional error in their review of the evidence. The record is utterly devoid of any evidence which indicates any reason for this Court to review this case and to re-examine the factual determinations previously made by the lower court and upheld by the appellate court. *Mobil Oil Corp v. FPC*, 417 U.S. 283, 310 (1984); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

For the foregoing reason, as well as the reasons stated by co-Respondent General Motors, the petition should be denied.

I.

THE DISTRICT COURT'S ENTRY OF AN ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF BOB SCHMIDT AND THE AFFIRMANCE BY THE COURT OF APPEALS WAS NOT CLEARLY ERRONEOUS.

Petitioners' claims against Bob Schmidt were terminated in the lower court by Opinion and Order granting Summary Judgment in favor of Bob Schmidt as to the allegations based upon negligence and products liability on October 14, 1992. The Sixth Circuit Court of Appeals affirmed the district court's decision on May 26, 1994. The standard of review for an appellate court in reviewing a Summary Judgment Order is that of "clearly erroneous."

This Court described the "clearly erroneous" standard of review in *United States of America v. United States Gypsum Co.*, 333 U.S. 364 (1947). The Court stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. The distinct court's findings are conclusive upon appeal unless

they are found to be clearly erroneous. *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 792 (6th Cir. 1984).

Accordingly, the lower courts' determinations must be upheld by this Court unless they are shown to be clearly erroneous. To reverse, this Court must find that there is competent and credible evidence supporting each essential element of Petitioners' claims.

Petitioners' Complaint raised claims against Bob Schmidt grounded in negligence and products liability. Either theory of recovery requires a showing by Petitioners of proximate causation, which must be demonstrated by a preponderance of the evidence. Petitioners, during the almost seven years which elapsed from the date of the accident to the termination of litigation by the trial court on summary judgment, failed to demonstrate the requisite proximate causation nexus. The evidence in the record clearly shows that there is no genuine issue of material fact, even when the evidence is construed most strongly in favor of Petitioners.

A. Petitioners' Allegations Of Wrongdoing Pertaining To Bob Schmidt

Petitioners contend that certain conduct or omissions by Bob Schmidt caused Mr. Setola's alleged brake failure and claimed injuries. In summary, Petitioners contentions follow:

> (1) Mr. Setola claims that Bob Schmidt was negligent when its personnel allegedly "ordered" him to drive his car to the dealership after he reported having braking problems.
>
> (2) Mr. Setola also contends that Bob Schmidt was negligent when it allegedly returned the Corvette to Mr. Setola without fixing the brakes.

(3) Additionally, Mr. Setola alleges that Bob Schmidt was negligent when it returned the car to him with the contaminant in the brake fluid.

(4) Also, in connection with their theories of recovery against Bob Schmidt, Petitioners argue that the containment, mineral oil, later discovered in the brake fluid, can be construed as "one" of the proximate causes, or a "direct contributing cause" of the alleged brake failure.

Because all of the above allegations of Petitioners relate to their claims grounded in negligence or products liability law against Bob Schmidt, this Respondent will address the issues arising from the allegations in a single topical discussion.

At the outset Bob Schmidt must object to the framing of the Questions Presented for review and the Arguments for Jurisdiction as stated by the Petitioners. Contained within the Petitioners' Questions Presented for review and arguments of law are continual and frequent misstatements of fact that are wholly unsupported by credible evidence, supported only by the self-serving statements of Mr. Setola, for which no other competent, credible evidence has been introduced. In fact, so numerous are the misstatements of fact, which are presented as if they had been proven by competent and credible evidence, Bob Schmidt must vehemently reiterate its denial of any negligence whatsoever and further reiterate its denial of any liability as a result of Petitioners' claims based upon a products liability cause of action.

B. Essential Elements Required to Support Petitioners' Claims

Petitioners' claims against this Respondent sound in either negligence or products liability theories. Petitioners have wholly failed to demonstrate by any credible evidence the necessary

elements required to support either theory. Accordingly their claims against this Respondent are doomed to fail.

In order to establish actionable negligence, Petitioners must establish, by a preponderance of the evidence: (1) the existence of a duty; (2) a breach of that duty; and, (3) an injury proximately resulting therefrom. *Jeffers v. Olexo*, 43 Ohio St. 3d 140, 143, 539 N.E. 2d 614, 617 (1989); *Menifee v. Ohio Welding Products,* 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707, 710 (1984).

The elements required to prove an action grounded in negligence are clearly conjunctive. A plaintiff must prove each element by a preponderance of the evidence. Where there is insufficient proof to satisfy an essential element of the claim of negligence, the plaintiff's case must fail. *Jeffers,* 43 Ohio St. 3d at 143, 539 N.E. 2d at 617.

In order to prevail on a claim of product liability in connection with defects in automobiles, the plaintiff must prove by a preponderance of the evidence that: (1) there was, in fact, a defect in the product manufactured and sold by the respondent; (2) such defect existed at the time the product left the hands of the respondent; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss. *State Farm Fire and Casualty Co. v. Chrysler Corp.*, 37 Ohio St. 3d 1, 5-6, 523 N.E. 2d 489, 493 (1988). All three elements must be satisfied for a plaintiff to recover. *Id.* at 6-7, 523 N.E. 2d at 494. A preponderance of evidence is required to show that the claimed loss was caused by a defect and not by other possibilities. *Id.* at 6, 523 N.E. 2d at 493-494.

Petitioners' claims of negligence and strict liability failed because they were unable to factually demonstrate either that there was a defective brake system or that the injuries Mr. Setola claims as a result of the accident were proximately caused by the conduct or omissions of Bob Schmidt.

In their Brief, Petitioners contend that a representative of Bob Schmidt told or "ordered" Mr. Setola to drive the car to the dealership after Mr. Setola informed the dealership representative that the brakes were not functioning properly. Petitioners rely upon two affidavits for these allegations: the first, an affidavit of a Mr. Karoly (Record Entry No. 61); and, the second, an affidavit of Mr. Setola (Record Entry No. 60). Upon Bob Schmidt's Motion to Strike, the court struck both of these affidavits. Mr. Karoly's affidavit was struck because the court found that he did not satisfy the requirements necessary to be an expert. Mr. Setola's affidavit was struck for the reason that it contained within its twenty-eight pages, rambling narrative which were self-serving declarations, speculation and inadmissible evidence and that it further contained a portion of a second affidavit. (Record Entry No. 83).

The affidavits, which claim that someone from Respondent Bob Schmidt "ordered" Mr. Setola to drive the car to the dealership after he reported braking problems, were properly struck by the court and are not included as admissible evidence in the record. There is, simply, no basis for Petitioners' reliance thereon and no basis for the issue on appeal.

Further, a review of Petitioners' response to Interrogatories wherein Bob Schmidt requested Petitioners to provide detail to support their allegations of negligence against Bob Schmidt demonstrates that the Petitioners did not mention in their response that a representative of Bob Schmidt "ordered" Mr. Setola to drive his car to the dealership. The allegation that someone from Bob Schmidt "ordered" Mr. Setola to drive his car to the dealership on the morning of his accident did not arise until after Bob Schmidt's Motion for Summary Judgment was filed. (Record Entry Nos. 20 and 22).

It is a well established rule that the appellate court will not review on appeal factual considerations not presented in the

district court. *Guarino* v. *Brookfeld Twp. Trustees*, 980 F.2d 399, 404 (6th Cir. 1992). When reviewing a summary judgment, the Court of Appeals will look at the record in the same fashion as the district court. *Id.* Accordingly, Petitioners are not entitled to a review by this Court on the factual issue of whether Bob Schmidt "ordered" Mr. Setola to drive his Corvette to the dealership.

Petitioners further attempt to allege wrongdoing by Bob Schmidt by stating conclusions of fact as if the facts had been proven by competent credible evidence. Question Number Five alleges that Bob Schmidt was negligent in returning the vehicle to Mr. Setola without finding and correcting the alleged brake problems. Again, Petitioners endeavor to argue their case as if certain allegations had been established. In Question Number Five, Petitioners simply state conclusions that are not founded in fact and then argue that these "facts" create a jury question.

The evidence in the record simply does not support the factual conclusions stated by Petitioners. The competent and credible evidence in the record is contrary to the "facts" as stated by the Petitioners. They have entirely failed to produce any credible evidence to satisfy their burden of proof.

C. Proximate Cause as a Matter of Law

In connection with the issue of proximate causation, Petitioners apparently endeavor to draw some sort of distinction between "a proximate cause" or a "cooperating cause" or "a direct contributing cause" or "one of the proximate causes" of Mr. Setola's accident, which somehow provides them with the requisite element of proximate causation.

The Ohio Supreme Court described the rule of proximate cause as:

> . . . that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.

Jeffers v. Olexo, 43 Ohio St. 3d at 143, 539 N.E. 2d at 617.

In the instant case, the question is whether any acts or omissions of Respondent Bob Schmidt proximately caused the collision and the injuries of which Mr. Setola complains. A review of the evidence properly before the Court can lead to only one conclusion and that conclusion is "no," the finding correctly made by the district court, and affirmed by the appellate court.

In support of its position, Bob Schmidt offered the following evidence: (1) an affidavit by eyewitness Nancy McCray; (2) the deposition testimony of Officer Thomas Medon; (3) the affidavit of John Schaller, service manager of Bob Schmidt; and, (4) the report of Mr. Wilson, a professional engineer employed by Mr. Setola's liability carrier to investigate Mr. Setola's claim of brake failure.[1]

Nancy McCray was the driver of the automobile

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1. It must be noted that affidavits which conform to the requirements of Rule 56(e) and deposition testimony may be relied upon in deciding a motion for judgment. Fed. R. Civ. P. 56(e).

immediately in front of the vehicle that Mr. Setola struck. She saw in her rear view mirror the Corvette driven by Mr. Setola approaching the intersection. She testified that she observed the Corvette approaching at such a high rate of speed that she knew it would be unable to stop and that it would impact the vehicle behind hers.

One of the investigating police officers, Officer Medon testified in his deposition that Mr. Setola indicated to the officers that there was some malfunction of the braking system prior to the collision. However, Mr. Setola was unable to demonstrate to Officer Medon that a malfunction of the vehicle was at fault in the accident. Mr. Setola requested that he be permitted to move the Corvette from the roadway and Officer Medon did not observe Mr. Setola having any difficulty stopping his vehicle. Officer Medon further testified that Mr. Setola would not have been permitted to retain custody of his vehicle if he had demonstrated that the braking system was not functioning. Moreover, if Mr. Setola had demonstrated to the investigating officers that brake malfunction was the cause of the accident, Mr. Setola would have been issued a citation for defective equipment and no such citation was issued.

As additional support for Petitioners' inability to establish the requisite proximate causation connection between the alleged negligence of Bob Schmidt and Mr. Setola's collision and resulting injuries, Mr. John Schaller, Service Manager of Bob Schmidt testified as to the safety procedures undertaken in the ordinary course of business in testing braking systems before releasing a vehicle to a customer and produced all the service or repair orders pertaining to the Corvette. The documentary evidence clearly indicates that Mr. Setola's claims of repeated braking problems lack foundation.

The evidence provided by Mrs. McCray, Officer Medon and Mr. Schaller is substantiated and corroborated by Lawrence F.

Wilson, the professional engineer employed by Mr. Setola's liability carrier to investigate the allegations of Mr. Setola that the collision was caused by failure of the braking system. Mr. Wilson concluded that it was impossible to prove that the mineral oil found in the brake fluid several weeks subsequent to the accident had any effect on the braking actions of the vehicle.

In short, the evidence in the instant case leads to the inescapable conclusion that there was no defect; there was no negligence due to acts or omissions by Bob Schmidt. Even when viewed in a light most favorable to Petitioners, the evidence leads to the inescapable conclusion that the proximate cause of the rear-end collision on January 30, 1986 was Mr. Setola's excessive speed. The competent, credible evidence in this case contradicts and refutes the unsubstantiated, self-serving allegations by Mr. Setola. The mere fact that Mr. Setola said his brakes did not work is not the "circumstantial evidence" which should lead this Court to overturn the lower court's decision as Petitioners contend.

D. The Rule 56(c) Standard

Respondent Bob Schmidt filed its Motion for Summary Judgment on the grounds that there were no genuine issues of material fact and it was entitled to an Order granting Summary Judgment on the evidence of affidavits, deposition testimony and the deemed admissions of Mr. Setola.

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the circumstances under which an Order for Summary Judgment shall be granted. The Rule reads in pertinent part:

> **Rule 56(c). Summary Judgment**
>
> * * *
>
> **(c) Motion and Proceeding Thereon.**

* * *

> The judgment sought shall be rendered forthwith if the pleading or depositions, . . . admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law;

In construing the standards for granting a motion for summary judgment, this Court stated that there can be no "genuine issue of material fact" in situations where there has been adequate time for discovery, and where a party fails to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). An entry of summary judgment is entirely appropriate where there is no proof to support an essential element of the non moving party's case, as such failure renders all other facts immaterial. *Id.* Where the standard for summary judgment as set forth in Rule 56(c) is demonstrated, the motion for summary judgment should be granted. One of the purposes of summary judgment is to expeditiously isolate and dispose of legal claims that have no factual foundation. *Id.* at 323-24, 106 S. Ct. at 2553.

In the instant case, there is no genuine issue of a material fact. The Petitioners have failed to provide evidence sufficient to support their claims against Bob Schmidt. The only credible evidence corroborates the journalized admission of Petitioners wherein they judicially admitted that the cause of the accident on January 30, 1986 was Mr. Setola's failure to maintain an assured clear distance.

E. Conclusion

The district court properly granted summary judgment in favor of Bob Schmidt. There is no genuine issue of material fact. There is no reason to try this case. Mr. Setola's collision was the result of his operation of the Corvette at a rate of speed that was too fast to stop in time to avoid hitting the car ahead of him. The manifest weight of the evidence supports that conclusion. The Court of Appeals properly affirmed the lower court's judgment.

II.

THE LOWER COURT'S ORDER GRANTING RESPONDENT'S MOTION TO STRIKE CERTAIN AFFIDAVITS SUBMITTED BY THE PETITIONERS DID NOT CONSTITUTE AN ABUSE OF DISCRETION.

Petitioners contend that the district court erred when it refused to consider some (unspecified) affidavits that the Petitioners filed, but rather rejected any such consideration, by striking them. A review of the docket reveals that the only two affidavits filed prior to the entry of the Opinion and Order granting the Motion of Bob Schmidt for Summary Judgment, which were struck by the court, were an affidavit of a Mr. Karoly and an affidavit of Mr. Setola. (Record Entries 61 and 60, respectively). These two Affidavits were struck by Order granting Bob Schmidt's Motion to Strike filed on January 27, 1992. (Record Entry 64; Order, Record Entry 83). Numerous other affidavits were filed by Petitioners. Respondents moved to strike, but the other Motions of Respondents to Strike were denied as moot.

Petitioners refer to numerous affidavits in their Petition. For purposes of this argument, Bob Schmidt will assume that Petitioners refer to the affidavits of Mr. Karoly and Mr. Setola. These two affidavits were filed by Petitioners in an attempt to

oppose Bob Schmidt's Motion for Summary Judgment. In its Motion requesting that the Court strike the affidavits, Bob Schmidt argued that the affidavits failed to comport with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.

In its Order granting Bob Schmidt's Motion to Strike, the district court found that Mr. Setola's affidavit was a "running narrative replete with self-serving declarations, speculation and inadmissible 'evidence' running some twenty-eight pages long and containing a portion of a second affidavit." (Opposition Appendix C; Record Entry 83, pp. 4-5). In ruling that the affidavit must be struck, the court stated that it need not wade through the affidavit and excise the stricken portions where the speculation was intertwined throughout the entire affidavit. The court, in striking Mr. Karoly's affidavit, found that the affidavit did not affirmatively show that he was an expert on Corvette braking systems.

Rule 56(e) controls a party's use of affidavits to either support or oppose a Motion for Summary Judgment. The Rule provided that when a party uses affidavits to oppose a Motion for Summary Judgment, certain specific requirements must be satisfied. The Rule, in pertinent part, reads as follows:

Rule 56. Summary Judgment

* * *

> (e) Form of Affidavits; Further testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or

> certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The requirements which govern affidavits submitted in support or in opposition to Motions for Summary Judgment are mandatory. *Automatic Radio Mfg. v. Hazeltine Research, Inc.*, 339 U.S. 827, 831, 70 S. Ct. 894, 896 (1950). *See also,* Wright & Miller 10A *Federal Practice and Procedure* 467 (1983). It is clear from the language of the Rule itself as well as from this Court's construction of the Rule, that an affidavit used to oppose a Motion for Summary Judgment must comply with the rules pertaining to admissibility with respect to the matters averred within the affidavit and as to the affiant. Unless the requisite criteria are satisfied, the affidavit is not admissible and must not be considered.

Essentially two requirements must be satisfied in order to have the affidavit construed as evidence sufficient to either oppose or support a Motion for Summary Judgment. First and foremost, the affidavit must present evidence that would be admissible at trial. If the affidavit does not present evidence that

is admissible at trial, the affidavit is insufficient and must be struck. *Carter v. Western Reserve Psychiatric Habilitation*, 767 F.2d 270, 273 (6th Cir. 1985); *Newhouse v. Probert*, 608 F. Supp. 978 (D.C. Mich. 1985). *See also*, Wright & Miller, 10A *Federal Practice & Procedure* 467-73 (1983). The affiant must testify from first hand knowledge. *Newhouse*, 608 F. Supp. at 983. An affidavit which is hearsay is not entitled to consideration. *Turoff v. May Co.*, 531 F.2d 1357, 1362 (6th Cir. 1976).

Similar requirements are imposed with respect to an affidavit submitted by a purported expert. Rule 56(e) does not make any distinction in the requirements for affidavits when the affiant is an expert. There is no exception to the Rule 56(e) requirements for affidavits based upon " 'professional knowledge, judgment and opinion.' " *Freeman v. Minnesota Mining & Manufacturing Co.*, 675 F. Supp. 877, 887 (D. Del. 1987). Where an expert testifies by way of affidavit, the expert must base his opinion on personal knowledge. *Id.; Kern v. Tri-State Insurance Co.*, 386 F.2d 754, 756 (8th Cir. 1968). The opinion of an expert based upon speculation is inadmissible for want of substantial evidence. *Kern*, 386 F.2d at 756; *Freeman*, 675 F. Supp. at 887.

Second, Rule 56(e) further requires that an affidavit submitted by an expert must affirmatively demonstrate that the affiant is competent to testify with respect to matters in the affidavit. *Freeman*, 675 F. Supp. at 887. Where a purported expert affiant merely states his professional positions without any further demonstration of an expertise in the subject area which is at issue in the case, the affiant is not competent to testify. *Id.* Further, where the affidavit of a purported expert is in the nature of an opinion or a general denial rather than setting forth specific facts, the affidavit of the expert is not sufficient evidence. *Id.*

The central issue when determining Motions for Summary Judgment is whether there are genuine issues of material fact to

try. Where there are unsubstantiated and inadmissible affidavits, they cannot, as a matter of law, be used to oppose a summary judgment motion. *Automatic Radio Mfg.*, 339 U.S. at 831, 70 S. Ct. at 896. The opponent of a Motion for Summary Judgment must designate " 'specific facts showing that there is a genuine issue for trial." ' *Celotex Corporation v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986).

It is clear from a reading of the affidavit of Mr. Karoly that he has not satisfied the requirement of demonstrating that he is an expert on the braking systems of Corvette automobiles. He is, simply stated, a mechanic. Mr. Setola's twenty-eight page affidavit contains an embellished re-hash of his accusations of wrong-doing of Bob Schmidt and his alleged problems with the braking system. Much of the affidavit is in third-party form. It does not contain the requisite specific facts which would demonstrate the existence of a genuine issue for trial.

Petitioners also assert without support that a district court may have a duty to accept an affidavit if there is a "reasonable inference" that the affiant is an expert. This contention is without merit. The rule requires that the affidavit of a purported expert must *affirmatively demonstrate* that the affiant is competent to testify about the subject matter at issue. Where the affirmative demonstration is lacking, the affiant must not be considered competent to testify. *Freeman*, 675 F. Supp. at 887.

This Respondent had been unable to find support for the proposition which Petitioners seek. However, the Sixth Circuit Court of Appeals has stated that in responding to a motion for summary judgment, the non-moving party bears the burden of *setting forth specific facts showing there is a genuine issue for trial.* (Emphasis added). The non-movant must designate the portions of the record which show specific facts with sufficient specificity that the "court can readily identify the facts upon which the non-moving party relies." *Guarino v. Brookfield Twp.*

Trustees, 980 F.2d 399, 405 (6th Cir. 1992). There is nothing in the Rules or in case law which imposes a duty that the trial court must conduct its own investigation of the record. *Id.*

The cases cited by Petitioners, ostensibly in support of their argument relative to the affidavits which were stricken, show clearly a lack of merit in Petitioners' position. In fact, review of the cases reveal support for the arguments of Respondents, as well as the position taken by the district court in striking the affidavit of Mr. Setola. Interestingly, the Georgia District Court, in granting a motion to strike an affidavit submitted in support of a Brief in Opposition to Partial Summary Judgment, for the reason that it failed to conform to the requirements of Rule 56(e), stated:

> An affidavit submitted in connection with a summary judgment motion is subject to a motion to strike if it does not measure up to the standards of Rule 56(e). (Citation omitted). While the court may strike or disregard the inadmissible portions of such affidavit not in conformity with the rule and consider the rest of the affidavit, the entire affidavit may be disregarded if inadmissible matter is so interwoven or inextricably combined with the admissible portions that it is impossible, in the practical sense, to separate them.

Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 380-81 (N.D. Ga. 1975).

Similarly, a review of the authorities cited by Petitioners to support their argument that the lower court improperly struck the affidavits indicate unequivocally the paucity of support therein for Petitioners' position. It is notable that the authorities cited by

Petitioners actually lend support to the trial court's decision to strike. "Affidavits filed by a party in support of or in opposition to a motion for summary judgment must present evidence. The affidavits should follow 'substantially the same form as though the affiant were giving testimony in court.' " *Seward v. Nissen*, 2 F.R.D. 545, 546 (D. Del. 1942). "An affidavit of expert opinion has been held admissible only when made by an affiant with the necessary expert qualifications." *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438, 446 (2d Cir. 1940).

Mr. Setola's rear-end collision occurred on January 30, 1986. Bob Schmidt filed its Motion for Summary Judgment on December 6, 1991. Petitioners had almost six years to acquire competent, credible and admissible evidence to support their allegations against Bob Schmidt. Petitioners have entirely failed to carry their burden. The district court properly struck the affidavits and has no duty to search through Petitioners' writings to attempt to locate specific admissible facts.

III.

THE PRIOR DILATORY CONDUCT OF PETITIONERS WARRANTS A DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI.

It is axiomatic that a civilized society requires rules by which its citizens are required to abide. Such an axiom is no less true in the administration of justice. Thus, the Federal Rules of Civil Procedure, along with the Rules of Evidence, are the beacons by which the ships of law are guided through the seas of federal courts. When those beacons are disregarded, the result is confusion and chaos. There is no doubt that Petitioners have consistently disregarded the beacons provided by our system of justice in this case. In so doing, the risk that they undertook resulted in the shipwreck of their case on the shoals of procrastination.

In reviewing the almost seven years of the life of this litigation (not to mention the fact that almost nine years have passed since the incident which gave rise to the litigation), one cannot help but be struck by the unending pattern of delay practiced by Petitioners. A few examples of the pattern are set out chronologically below.

1. January 30, 1986: incident occurs;

2. January 29, 1988: lawsuit filed one day before statute of limitations expires;

3. June 29, 1988: lawsuit voluntarily dismissed when motion is filed to dismiss for lack of prosecution;

4. June 29, 1989: lawsuit is re-filed on last day allowed under Ohio statutory law;

5. November 13, 1990: requests for admissions served on Petitioners (responses due December, 17,1990);

6. March 18, 1991: General Motors moves for deemed admissions of requests;

7. April 5, 1991: Petitioners request additional time to respond to requests for admissions;

8. April 10, 1991: Order entered deeming requests admitted;

9. June 12, 1991: General Motors moves for summary judgment;.

10. November 4, 1991: General Motors' motion for summary judgment granted;

11. December 6, 1991: Bob Schmidt moves for summary judgment;

12. January 7, 1992: Petitioners file opposition to Bob Schmidt's motion;

13. June 17, 1992: Petitioners move to have admissions withdrawn;

14. October 14, 1992: Bob Schmidt granted summary judgment.

A casual perusal of the dates set out above demonstrates that Petitioners repeatedly filed court documents on the last possible date, or, more frequently, ignored filing dates altogether without explanation or apology. Such conduct is in direct contravention to Rule 1 of the Federal Rules of Civil Procedure, which states, in pertinent part:

> . . . They shall be construed to secure the just, *speedy,* and inexpensive determination of every action. (Emphasis added).

Over thirty years ago, in *Link v. Wabash R.R.*, 370 U.S. 626 (1962), *reh'g denied,* 371 U.S. 873, this Court recognized that speed in judicial administration "is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." *Id.* at 629. While that case involved a dismissal with prejudice for plaintiffs' failure to prosecute, the principle espoused is equally applicable to this matter, where Petitioners' repeated delays, at least in part, resulted in a decision adverse to their position. The justice of that determination cannot now be seriously questioned.

Petitioners' own conduct has brought their case to the point where it now rests, on the "shoals of procrastination." There is nothing in the decisions of the district court or the Court of Appeals that warrants a review by this Court. Accordingly, Petitioners' petition should be denied.

CONCLUSION

The United States District Court properly terminated this litigation. The Court of Appeals for the Sixth Circuit properly affirmed the district court's judgment. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OPPOSITION APPENDIX

Petitioners' Appendix includes the Opinion and Order granting *inter alia* this Respondent's Motion for Summary Judgment in a form that was re-typed by Petitioners. This Opinion, dated October 14, 1992, was unreported. For the convenience of the Court, it is included herein as Opposition Appendix C.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:90CV7317

FRANK SETOLA, et al.,

Plaintiff,

-vs-

BOB SCHMIDT CHEVROLET, INC., et al.,

Defendant.

OPINION AND ORDER

WALINSKI, J.

This matter is before the Court on plaintiffs' motion for reconsideration, Bob Schmidt and General Motors' motions to strike plaintiffs' motion for reconsideration and plaintiffs' motion for leave to file affidavits. Also before the Court are defendant's motion for summary judgment, defendant's motion to strike affidavits, plaintiffs' motion for leave to file and plaintiffs' third motion for extension of time and replies thereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Plaintiffs seek reconsideration of this Court's August 4, 1992 Memorandum and Order wherein their motion for withdrawal of admissions was denied. While a motion for reconsideration is not

mentioned in the Federal Rules of Civil Procedure, it serves a legitimate and valuable role in certain situations. *Nat'l Union Fire Ins. Co. v. Continental Illinois Corp.*, 116 F.R.D. 252, 253 (N.D. Ill. 1987), *citing Above The Belt, Inc. v. Mel Bohannan Roofing, Ind.*, 99 F.R.D. 99 (E.D. Va. 1983).

Generally, there are three major situations which justify a court reconsidering one of its orders: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or to prevent manifest injustice." *Kern-Tulare Water Dist. v. Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part, rev'd in part* 828 F.2d 514 (9th Cir.), *cert denied* 486 U.S. 1015 (1988). However, the motion for reconsideration must demonstrate to the court why it should reconsider its decision and set forth strongly convincing facts or law which would induce it to reverse its prior decision. *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo. 1988). Motions for reconsideration are not substitutes for appeal nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings. *Karr v. Castle*, 768 F. Supp. 1087, 1093 (D. Del. 1991), *citing Brambles U.S.A., Inc. v. Blocker*, 735 F. Supp. 1239 (D. Del. 1990).

In the case *sub judice*, plaintiffs presents no justifiable reason for consideration of the previous decision. Instead, plaintiffs' argue that defendants' motion to journalize the admissions came as a surprise as GM failed to utilize Local Civil Rule 3.04[1] to convey the seriousness of the admissions. Counsel

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1. Local Rule 3.04 reads in pertinent part:

> To curtail undue delay in the administration of justice, no discovery procedure . . . to which *objection or opposition is made by the responding party* shall be

(Cont'd)

for plaintiff indicates that had this procedure been implemented, "the matter would have been worked out". However, counsel for plaintiffs should be aware that requests for admissions and response time thereto is clearly addressed within the Federal Rules of Civil Procedure and does not require more of opposing counsel before seeking journalization of admissions. Plaintiffs' motion for reconsideration is not well taken. Accordingly, defendants' motions to strike the motion for reconsideration and plaintiff's motion for leave to file affidavits in opposition to the motions to strike are denied as moot.

The Court now turns to Bob Schmidt's motion to strike the affidavits of Frank Setola and Alan J. Karoly. It is Bob Schmidt's contention that the affidavits do not meet the requirements of Rule 56(e) and cannot be considered in opposition to the motion for summary judgment.

Rule 56(e) states in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that

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(Cont'd)

> taken under consideration by the Court unless the party seeking discovery shall first advise the Court in writing that, after personal consultation and sincere attempts to resolve differences, the parties are unable to reach an accord . . .

(emphasis added).

The Court notes that the Local Rules were amended as of Jan. 1, 1992.

> the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

As to the three requirements regarding affidavits submitted in opposition to a motion for summary judgment, Bob Schmidt argues that plaintiff's affidavit devoid of personal knowledge as it is written in the third person and is therefore not a sworn statement of the affiant. Defendant also states that the affidavit, even if cured of this defect, does not contain any admissible evidence sufficient to oppose the motion for summary judgment.

A review of Setola's affidavit finds that it differs in form to that of a traditional affidavit but nevertheless contains the sworn affirmation of the affiant as to its contents on the last page. While the majority of the affidavit is written in the third person, that factor alone cannot render the affidavit defective as Setola avers the statements contained therein as his own.

However, whether the affidavit contains admissible evidence sufficient for the Court's consideration is a different issue altogether. The rule is clear that information contained within the affidavit must be within the *personal knowledge* of the affiant. Fed. R. Civ. P. 56(e). However, such information cannot be based on a belief as it would constitute speculation and be inadmissible in court. *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989). Conclusions of law are not appropriate within an affidavit. 6 J. Moore & Wicker, Moore's Federal

Practice ¶ 56.22[1] (2d ed. 1988). However, where the court *can* separate the conclusions and speculation from the admissible evidence, it may strike those portions of the affidavit. *Id.*

In this case, the Setola's affidavit is a running narrative replete with self-serving declarations, speculation and inadmissible "evidence" running some twenty-eight pages long and containing a portion of second affidavit. The Court need not wade through and excise the stricken portions where such speculation is intertwined throughout the entire affidavit. Accordingly, the Court finds Bob Schmidt's motion to be well taken and Frank Setola's affidavit is hereby stricken.

Second, Bob Schmidt requests that Alan J. Karoly's ("Karoly") affidavit be stricken as it also fails to comport with the mandates of Rule 56(e). First, defendant takes issue with Karoly's competency as an expert. Karoly identifies his auto mechanic experience and certification as a Master Automotive Technician by the National Institute of Automotive Service Excellence ("ASE"). He further states that he worked as a mechanic for a local dealer for some two and one half years before starting his own towing business in 1986. While Karoly's qualifications regarding his expertise of braking systems is minimal, he has not demonstrated knowledge of Corvette braking systems which would render his opinion that of an expert. His statement that he has "worked on Corvettes and their brake systems" is not a sufficient basis to warrant expert status. For these reasons, the Court finds defendant's motion to be well taken and will strike Karoly's affidavit.

The Court now turns to Bob Schmidt's motion for summary judgment and give a brief recitation of the facts. This case was filed in this court in June 1990 after having been voluntarily

dismissed the action in state court.[2] Frank Setola bought a 1985 Chevrolet Corvette from Bob Schmidt on December 3, 1985 and alleges that he experienced brake problems and returned the car to the dealer for repairs. The last repair work done by Bob Schmidt is dated as January 23, 1986. Setola states that he relied upon the dealer's representation that the car was fine to drive. On January 30, 1986 Setola was involved in an accident with the vehicle and was cited for failure to maintain an assured clear distance. Plaintiff and his wife assert a products liability and negligence claim against the dealer for injuries incurred as a result of the accident. Bob Schmidt has filed for summary judgment and plaintiffs' submit their opposition thereto.

Rule 56, Fed. R. Civ. P., directs the disposition of a motion for summary judgment. In relevant part Rule 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Court's function in ruling on a motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute. *United States v. Articles of Device*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Tee-Pak, Inc. v. St. Regis*

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2. Originally filed in the Court of Common Pleas in Lucas County, plaintiffs filed for a voluntary dismissal without prejudice on June 22, 1989. Thereafter, on June 22, 1990, plaintiffs filed this diversity action against the same defendants.

Paper Co., 491 F.2d 1193, 1195 (6th Cir. 1974). Further, "[i]n ruling on a motion for summary judgment, the evidence must be viewed in a light most favorable to the party opposing the motion." *Bouldis v. U.S. Suzuki Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). To summarize, summary judgment is only appropriate when no genuine issue of material fact remains to be decided, and when the undisputed facts viewed in a light most favorable to the non-moving party, entitle the movant to judgment as a matter of law. *Smith v. Pan Am World Airways*, 706 F.2d 771, 773 (6th Cir. 1983).

A principle purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Rule 56(e) places responsibility on the party against whom summary judgment is sought to demonstrate that summary judgment is improper, either by showing the existence of a material question of fact or that the underlying substantive law does not permit such a decision. In relevant part the provision states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. Rule 56(e) requires the non-moving party to go beyond the pleadings, and by affidavits, depositions, answers to interrogatories, or admissions on file, designate

specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. at 324.

In bringing a negligence action, the plaintiff must establish 1) a duty; 2) a breach of that duty; and 3) an injury which proximately results from the breach. *Di Gildo v. Caponi*, 18 Ohio St. 2d 125, 247 N.E. 2d 732 (1969); *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St. 3d 75, 77, 472 N.E. 2d 707 (1984). To defeat a motion for summary judgment, the plaintiff must identify the duty owed and the evidence must be sufficient to allow reasonable minds to infer that the duty was breached which proximately caused plaintiff's injuries. *Keister v. Park Centre Lanes*, 3 Ohio App. 3d 19, 22-24 (1981).

The Setolas have submitted that there is a duty by a service department when repairs are undertaken and a vehicle is returned for use to the owner. Sonja P. Soehnel, Annotation, *Product Liability: Personal Injury or Death Allegedly Caused by Defect in Braking System in Motor Vehicle*, 99 A.L.R. 3d 179 (1980). Plaintiffs next assert that Bob Schmidt breached this duty by selling him a defective vehicle and failing to repair the brake problems prior to the accident. In support of this, Setola states in answers to Bob Schmidt's interrogatories that the car was taken back to defendant's shop three times for problems with the vehicle's brakes.

The first repair order dated 12/9/85 gives no indication of brake problems. The work done according to the repair order dealt with adjusting the timing, performing injector balance test and ordering injectors. Defendants' Exhibit B. The second work order dated 12/19/85 indicates problems as being "rear brakes lock up" and "rear axle lks". The car mileage was 3233. However, the service manager's affidavit states that the work order was

voided as plaintiff was unable or unwilling to wait for the repair work. The third repair order was dated January 23, 1986 with the car mileage reading 7194. The complaints listed included rattles in the dash, door shutting hard, transmission shifting too soon, car stalling, coolant leak, horn and alarm won't operate among others. Most pertinent to this discussion is the notation "Ck for rear axle lk" and "left rear wheel and wheel seeming to lock up at times". This is followed by the dealer's conclusion "No leaks at this time". The repair order also indicates that the vehicle was road tested and the service manager avers that it is the standard and ordinary custom of their dealership to test the braking system of a vehicle before turning it back over to the owner.

Plaintiff's contention is that defendant failed in its duty to repair the car, but no evidence properly before the Court demonstrates that defendant breached its duty. More troublesome to plaintiff's case, however, is the element of proximate cause.

In *Jeffers v. Olexo, supra,* the court described proximate cause as:

> 'That which immediately precedes and produces the effect as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.' . . .

Id. at 143. (citations omitted).

Appendix C

Defendants submit the affidavit of Nancy McCray, an eyewitness to the accident in question. McCray's vehicle was in front of the car impacted by the Setola vehicle. It was McCray's observation that the Setola vehicle was approaching at a high rate of speed so much so that it would not have been able to stop before hitting the car behind her. Bob Schmidt also submits Officer Thomas G. Medon's deposition as Officer Medon investigated the collision. The police report corroborates McCray's affidavit and indicates that Mr. Setola was cited for failure to maintain assured clear distance. In his deposition, Medon did recall that Mr. Setola mentioned brake problems prior to the accident. However, Medon stated that there was no demonstrable indication that the vehicle was at fault which resulted in the citation to plaintiff.

In addition, defendants cite to the affidavit and report of Lawrence F. Wilson as supporting a finding of summary judgment for Bob Schmidt. Wilson, a professional engineer, was secured by plaintiff's insurer to investigate the claim of brake failure. Wilson's report states that the brake fluid in the master cylinders and wheel cylinders was contaminated with mineral oil and further:

> In our opinion, the brake fluid contamination of mineral oil caused the distortion of the master cylinder caps. *It was impossible, however, to prove that this had any effect on the braking actions of the vehicle,* because no distortions were found in the brake lines hoses nor the wheel cylinder caps.

Doc. #70, Exhibit B. (emphasis added).

Appendix C

Finally, admissions by the plaintiffs are offered by Bob Schmidt as evidence that the issue of causation is clearly not a question of fact:

> *Request for Admission No. 4:* Please admit that plaintiff Frank Setola's failure to maintain assured clear distance ahead caused the accident averred in plaintiffs' complaint.
>
> *Response:* Deemed admitted and journalized.

Plaintiffs argue that this judicial admission cannot provide comfort to Bob Schmidt as it was sought by GM. However, the complaint with its allegations of product liability was as against both Bob Schmidt and GM. The fact that one defendant sought an admission does not preclude its use against the second defendant especially when it goes to the same issue. Taking into account all the above presented evidence, it is clear that there is no genuine issue of material fact as to proximate cause. Furthermore, the undisputed facts even when viewed in a light most favorable to the plaintiff, clearly demonstrate that defendant is entitled to summary judgment on the negligence claim.

Finally, as to the product liability claim, the Court must also find in favor of the defendant on the issue of proximate cause as there is an absence of evidence to the contrary. *See, State Farm Fire Co. & Casualty v. Chrysler Corp.*, 37 Ohio St. 3d 1, 5-6, 532 N.E. 2d 489 (1988) (Preponderance of the evidence in a products liability claim must demonstrate that the defect was the direct and proximate cause of the plaintiff's injuries.)

Accordingly, it is

Appendix C

ORDERED that plaintiffs' motion for reconsideration is denied.

FURTHER ORDERED that defendants' motions to strike the motion for reconsideration is denied as moot.

FURTHER ORDERED that plaintiffs' motion for leave to file affidavits in opposition to the motions to strike is denied.

FURTHER ORDERED that defendants' motion to strike affidavits is granted.

FURTHER ORDERED that defendants Bob Schmidt's motion for summary judgment is granted.

FURTHER ORDERED that plaintiff's motion for extension of time to file additional affidavits in opposition to motions to strike is denied.

Cause dismissed.

s/ Nicholas J. Walinski
NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
October 14, 1992